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No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes	2
Questions Presented	2
Statement	3
Background of the Merger	4
The Pacific Northwest Pipeline Corporation	4
The El Paso Natural Gas Company	5
The California Market Area	6
Competition for the California Market	7
Pacific's Planned Entry into the California Market	7
The Negotiations to Enter the California Market	9
El Paso's Suppression of Pacific's Competition	10
Other Competitive Activity	11
Competition for Gas Supplies	12
Events Leading Up to the Merger	14
Background of the Stock Acquisition	14
The Stock Acquisition and the Price Paid	16
The Management of Pacific After Stock Acquisition	17
Operating Experience of Pacific	18
System Costs Not Covered by Revenues	18
The Decision to Merge	19
Summary of Events	20

Page

The Proceedings Before the Commission 21

The Administrative Hearings 21

The Order of the Commission 23

The Remarks of the Presiding Examiner Subsequent to This Proceeding 25

Disclosures Subsequent to the Merger Proceedings 26

Summary of Argument 27

I. The Decisions of the Court Below and of the Federal Power Commission Fail to Accommodate the Complementary Policies Underlying the Clayton and the Natural Gas Acts 28

A. Prior Resolution of Antitrust Question by the Courts Is Essential to Commission Action 28

1. The Underlying Policy 29

2. Administration and Enforcement of the Two Acts 30

3. Antitrust Problems Under the Natural Gas Act 31

4. Coordination and Enforcement 32

5. Statutory History of Section 7 of the Clayton Act 35

6. Some Practical Observations Coming from the Confusion of Authority 37

II. The Commission Could Not Lawfully or Correctly Determine Public Convenience and Necessity After Excluding from Consideration the Issue of Economic Impact of Applicants' Proposal and Its Effect Upon Rates 40

1. Previous Commission Decisions Upon Rates 41

2. Statutory History 42

3. The Natural Gas Act and the Regulations Under the Natural Gas Act 44

4. The Theory Underlying the Requirement of Data as to Impact Upon Rates 44

Page

5. The Necessity for Consideration of Cost Deficiencies and Rates 46

6. The Merger Benefits the Stockholders and Not the Public 48

III. The Commission Throughout the Proceedings Consistently Deprived California of Due Process 49

1. Failure to Consider Relevant Evidence 49
The Significance of the Omission upon the Part of the Examiner to Consider the Evidentiary Material Presented to Him 51

2. Wholesale Admission of Irrelevant Evidence Is a Denial of Administrative Due Process 53

3. Taking Official Notice of Other Projects Deprived California of Due Process 55

4. The Decision Was Deficient as to Findings and Evidence to Support the Findings 57

IV. The Commission Failed to Grant California a Fair Hearing in Permitting Representatives of the Applicants to Make Frequent Ex Parte Approaches to Its Members During the Course of the Hearings 61

A. Standards of Conduct Established by the Commission 61

B. The Failure of the Commission to Enforce Its Adopted Standard of Conduct 62

C. The Need for Remedial Action 63
The Predicament of California as an Intervenor 66

Conclusion 68

Appendices

TABLE OF AUTHORITIES CITED

Cases	Pages
Atlantic Ref. Co. v. Public Service Comm. of New York (1959) 360 U.S. 378	44, 46
Chapman v. Sheridan-Wyoming Coal Co. (1949) 338 U.S. 621	64
City of Pittsburgh v. F.P.C. (CADC, 1956) 237 F.2d 741	32
Colorado-Wyoming Gas Co. v. F.P.C. (1945) 324 U.S. 626	57
F.P.C. v. Hope Nat. Gas Co. (1944) 320 U.S. 591	30, 44
Gonzales v. United States (1960) 364 U.S. 59	54
Harwick v. Comm'r. (1943) 320 U.S. 489	41
Interstate Commerce Commission v. Louisville & No. R. Co. (1913) 227 U.S. 88	54
Lloyd Sabauda, S.A. v. Elting (1932) 287 U.S. 329	53
McClean Trucking Co. v. United States, 321 U.S. 67 (1943)	35
Morgan v. U.S. (1936) 298 U.S. 468	50
Morgan v. U.S. (1938) 304 U.S. 1	54
Northern Pacific R. Co. v. U.S. (1958) 356 U.S. 1	29
Ohio Bell Tel. Co. v. P.U.C. of Ohio (1937) 301 U.S. 292	50, 54, 56, 64
Panhandle Eastern Pipeline Co. v. F.P.C. (CADC, 1948) 169 F.2d 881	31
Phillips Petroleum Co. v. Wisconsin (1954) 347 U.S. 672	44
Public Service Commission of the State of New York v. F.P.C. et al., CADC No. 15366, decided June 15, 1961	44, 64
R. Comm. of California v. Pacific Gas & Electric Co. (1938) 302 U.S. 388	56
Simmons v. U.S. (1955) 348 U.S. 397	61
Sage v. Hampe (1914) 235 U.S. 99	68
Sunray Mid-Continent Oil Co. v. F.P.C. (1960) 364 U.S. 137	48

Pages

Texas & Pacific R. Co. v. Abilene Cotton Oil Co. (1906) 204 U.S. 426 33
Tool Company v. Norris (1864) 2 Wall. 45 68
Trist v. Child (1874) 21 Wall. 441 67

United States v. Abilene & So. Ry. Co. (1924) 264 U.S. 274 54
United States v. Miss. Valley Generating Co. (1961) ..... U.S. ....., 5 L.ed. 2d 268 63
United States v. Shaughnessy (1953) 347 U.S. 260 64
U. S. Navig. Co. v. Cunard S. S. Co. (1931) 284 U.S. 474 35

West Ohio Gas Co. v. P.U.C. of Ohio (1935) 294 U.S. 63 56

FEDERAL POWER COMMISSION DECISIONS

Central New York Power Corporation, 5 F.P.C. 194, 65 P.U.R. (N.S.) 510 (1946) 59
Northwest Natural Gas Company, Opinion No. 271, June 18, 1954, 6 P.U.R. 3d 403 4

Algonquin Gas Transmission Company, 12 F.P.C. 209 (1953) ..... App. 11
American Louisiana Pipeline Co., 20 F.P.C. 575, 21 P.U.R. 3rd 538 (1958) ..... App. 11
Atlantic Gulf Gas Co., 10 F.P.C. 79, 89 P.U.R. (N.S.) 272 (1951) ..... App. 10

El Paso Natural Gas Company, et al., 5 F.P.C. 115, 64 P.U.R. (N.S.) 152 (1946) ..... App. 7
El Paso Natural Gas Co., Docket No. G-16235, Examiner's Proposed Decision (1960) ..... App. 12

Hope Natural Gas Company, et al., 4 F.P.C. 59, 4 F.P.C. 161 (1944) ..... App. 7

Kansas Pipeline and Gas Company and North Dakota Consumers Gas Company, 2 F.P.C. 29 (1939) ..... App. 7

Michigan-Wisconsin Pipeline Company, 6 F.P.C. 1, 67 P.U.R. (N.S.) 427 (1947) ..... App. 8

Pages

Midwestern Gas Transmission Co., 22 F.P.C. 775, 28 P.U.R. 3d 380 (1959) ..... App. 11
Midwestern Gas Transmission Co., 21 F.P.C. 653, 29 P.U.R. 3d 586 (1959) ..... App. 12

Northern Natural Gas Co., 11 F.P.C. 174, 94 P.U.R. (N.S.) 485 (1952) ..... App. 10
Northern Natural Gas Co., 14 F.P.C. 11, 9 P.U.R. 3d 8 (1955) ..... App. 11

Pacific Gas Transmission Co., Docket No. G-17350, et al., Commission Order, page 4 (1960) ..... App. 12
Pacific Northwest Pipeline Corporation, 6 P.U.R. 3d 403 (1954) ..... App. 11

San Juan Pipeline Co., et al., 9 F.P.C. 170, 84 P.U.R. (N.S.) 129 (1950) ..... App. 9

Texas Illinois Natural Gas Pipeline Co., 9 F.P.C. 105 (1950) ..... App. 9
Trans-Continental Gas Pipeline Company, 7 F.P.C. 24 (1948) ..... App. 8
Transwestern Pipeline Co., 22 F.P.C. 391, 29 P.U.R. 3rd 556 (1959) ..... App. 12
Trunkline Gas Supply Co., 8 F.P.C. 250 (1949) ..... App. 9

United Gas Pipeline Co., et al., 10 F.P.C. 35 (1951) ..... App. 10

STATUTES

Clayton Act, Act of October 15, 1914, 38 Stat. 371, amended December 29, 1950, 64 Stat. 1124-1125, 15 U.S.C. 2, 36
Clayton Act, Act of October 15, 1914, c. 323, §§ 1-26; 38 Stat. 730 et seq.; 15 U.S.C. §§ 12-27 30
Section 7, 15 U.S.C. § 18, as amended Dec. 29, 1950, c. 1184; 64 Stat. 1125-1126 ..... 2, 20, 34, 35, 36, 56
Section 15, 15 U.S.C. § 24 30

Pages

Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, as amended 56 Stat. 83, 61 Stat. 459, 68 Stat. 36, 72 Stat. 947; 15 U.S.C. §§ 717-717w 29
Section 1(a), 15 U.S.C. § 717(a) 29
Section 4, 15 U.S.C. § 717c 45, 47
Section 7(c), 15 U.S.C. § 717f(c) 4, 41, 42
Section 7(d), 15 U.S.C. 717f(d) 44, 56
Section 7(e), 15 U.S.C. § 717f(e) 33, 40
Section 20(a), 15 U.S.C. § 717s(a) 30, 35

Interstate Commerce Act, § 5; Act of Feb. 5, 1887, as amended, § 5, 24 Stat. 380 as amended; 49 U.S.C. § 5 ..... 35, 36, 37

RULES AND REGULATIONS

Section 1.4(a)(3) of the Rules of Practice and Procedure of the Federal Power Commission (1958); 18 C.F.R. § 1.4(a)(3) 61
Section 157.16 of the Federal Power Commission Regulations Under the Natural Gas Act (1958); 18 C.F.R. § 157.16 2

LEGISLATIVE HISTORY

S. Doc. No. 92, Part 84-A, 70th Cong., 1st Sess. 29
H.R. Rept. No. 1290, 77th Cong., 1st Sess., pages 2-3 43
S. Rept. No. 948, 77th Cong., 2d Sess., pages 1-2 43
S. Rept. No. 1775, 81st Cong., 2d Sess. 37

MISCELLANEOUS

Report on Regulatory Agencies to the President-Elect, Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate (Committee Print), 88th Cong., 2d Sess., December 1960 ..... 65, 66

President's Special Message to Congress, "Ethical Conduct in the Government" (107 Cong. R. 6454, H.Doc. No. 145) 64

Canons of Professional Ethics, American Bar Association, 1908 (as amended through 1957), Canon 3 ..... 61, 62

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Brief for the Petitioner

OPINIONS BELOW

The opinion of the Court of Appeals (Docket No. 15687, decided March 30, 1961, R. 1434-1447) is not yet reported. The Federal Power Commission's Opinion and Order Issuing Certificates of Public Convenience and Necessity Authorizing Merger with Conditions and Adopting with Modifications the Decision of the Presiding Examiner issued on December 23, 1959, (R. 1290-1310) in the consolidated proceedings entitled "Pacific Northwest Pipeline Corporation, Docket No. G-13018" and "El Paso Natural Gas Company, Docket No. G-13019" is reported at 22 FPC 1092, 31 PUR3d 456: its Opinion and Order Denying Petition for

Rehearing and Stay, issued in the same proceedings on February 17, 1960 (R. 1353-1358) is reported at 23 FPC 350.

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1961 (R. 1447). The petition for a writ of certiorari was filed June 28, 1961. Certiorari was granted October 9, 1961. The jurisdiction of this court is based upon the provisions of 28 U.S.C. 1254(1).

STATUTES

The relevant parts of the statutes involved in this case are set forth in full in Appendix A, hereto. Citations to them are:

1. Clayton Act, Act of October 15, 1914, c. 323, § 7, 38 Stat. 731; as amended December 29, 1950, c. 1184, 64 Stat. 1125-1126, 15 U.S.C. § 18.
2. Natural Gas Act, Act of June 21, 1938, 52 Stat. 825, as amended February 7, 1942, 56 Stat. 83, and July 25, 1947, 61 Stat. 459; 15 U.S.C. §§ 717f(c) and 717f(e).
3. Rules of Practice and Procedure of the Federal Power Commission (1958), §§ 1.4(a)(3), 1.26(5)(d), and 157.16; 18 C.F.R. §§ 1.4(a)(3), 1.26(5)(d), and 157.16.

QUESTIONS PRESENTED

1. May the Federal Power Commission approve, in the public convenience and necessity, the merger of two natural gas companies, absent statutory authority to determine violations of the Clayton Act, and particularly where such approval is granted while a charged violation of Section 7 of the Clayton Act is pending and not adjudicated before the judicial department of government?

2. May the Federal Power Commission preclude inquiry into the economic impact of such merger upon the public

and, failing to know or to measure the consequences of such impact, still find such merger to suit the public interest?

3. May the Federal Power Commission be held to have conducted its proceedings as required by due process where it admittedly ignored evidence admitted into the record; where it found sufficient competition to dispel any claimed violations of the antitrust laws, through the curious device of taking official notice of other pipeline projects not yet in being nor even authorized; where cross-examination upon the economic impact of such merger upon consumers was restricted and precluded?

4. May the Federal Power Commission be held to have conducted its proceedings as required by due process where, upon a long and complex record in which due deliberation was requisite to a fair judgment, members of the Commission reached a quick decision after ex parte meetings with applicants in which expedition was urged?

STATEMENT

This case presents problems in the enforcement and administration of coordinate bodies of public law, as well as deficiencies in the practice and procedures of a federal regulatory agency. It arises from the attempt of one natural gas pipeline corporation to gain dominant control of the lucrative California market area and of rich natural gas fields by acquiring control of another such corporation.

To understand the factual basis from which these issues arise, it is necessary to consider the history of each corporation, the competitive relation between them—both as to market area and as to gas supplies—the preliminary efforts of management to facilitate the merger, and the related legal proceedings before the agency and the federal district court.

BACKGROUND OF THE MERGER

The Pacific Northwest Pipeline Corporation.

Pacific was incorporated under the laws of Delaware on June 2, 1949. Thereafter, commencing in 1950, a series of applications was filed with the Federal Power Commission under Section 7(c) of the Natural Gas Act, seeking authority and related rights to construct an interstate natural gas pipeline. The broad authority requested was for "the construction, acquisition, and operation * * * of a pipeline system for the interstate transportation of natural gas from a point or points in the States of New Mexico, Texas, and Colorado to points in the States of Utah, Washington, and Oregon * * *" (R. 944)

On June 18, 1954, Pacific was granted a certificate. *Re: Northwest Natural Gas Company*, Opinion No. 271, June 18, 1954, 6 P.U.R. 3rd 403. As the Opinion of the Commission stated at page 418:

> "The Pacific Northwest is the one remaining large area of this country with a great need for natural gas but which is still without this highly desirable fuel and raw material. It is a section where great industrial expansion has occurred and is still in progress and one which has played and continues to occupy a very important role in the national defense. The record amply demonstrates that it has a real desire and need for natural gas."

The Decision in discussing the future of Pacific stated this at page 416:

> "The economic feasibility of the Pacific project has been challenged. From a review of all the evidence we believe that Pacific's estimates are reasonable *and that its project is economically feasible. Under the rates proposed to be charged they can secure the estimated volumes and such rates will produce revenues*

adequate to cover operating expenses and taxes with sufficient return to insure the necessary financing." (Emphasis supplied.)

The El Paso Natural Gas Company.

El Paso was originally organized to bring gas to the area in and around El Paso, Texas, in 1929. In 1946 El Paso received authorization to deliver gas to the Southern California Gas Company and the Southern Counties Gas Company of California. In 1949 El Paso was authorized to deliver gas to the Pacific Gas and Electric Company of California. El Paso then become the sole out-of-state supplier of natural gas to California.

El Paso has experienced phenomenal growth. Initially in 1929 its pipeline was 200 miles in length with a delivery capacity of 36,000,000 cubic feet (Kayser, R. 290). Presently its system is 6700 miles of main and lateral pipelines with a certificated delivery capacity of approximately 2.7 billion cubic feet of gas per day (Holik, R. 150).

Today El Paso is one of the largest nonfinancial corporations in the United States. At the end of 1957 it ranked 29th in size and was the largest of the natural gas companies. It controls and has interests in natural gas properties extending from western Canada to the Republic of Mexico, and from Oklahoma to the California border (Kayser, R. 290-292; Exh. 1, facing R. 565). El Paso has invested more than $1,600,000,000 in the facilities that comprise its system. Some has gone to supply the markets it serves in Texas, New Mexico and Arizona. It is estimated that a full 80 per cent of its investment has gone into serving the California market. On this basis, El Paso has spent almost $1,300,000,000 to supply California. In 1945 El Paso's total business was just under $9,000,000. In 1959 it was $450,000,000.

The California Market Area.

The dependence of California upon natural gas as a fuel is unique among the states in the United States. California does not possess coal deposits sufficient for energy requirements. It is dependent upon natural gas for its energy needs and approximately three quarters of the natural gas utilized in California comes from out-of-state sources. Ninety percent of all homes in California are heated by natural gas and California industry depends upon natural gas as a fuel. In California the percentage of total energy provided by natural gas is substantially greater than for the nation as a whole.

During 1960, California gas distributing utilities purchased over 829,600,000,000 cubic feet of natural gas at a cost somewhat in excess of $266,850,000. California takes in excess of ten percent of all of the natural gas moving in interstate commerce throughout the United States and exceeds the volume of gas imported by any other state.

The interest of California in this proceeding is evident. More than 80% of the customers of El Paso before merger resided in the State of California and California ratepayers bear most of the costs of service of El Paso.[1] (Exh. 83, R. 712-736, Exh. 29, R. 692-712).

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1. "The largest volumes of the Company's gas sales are made under long-term contracts with Southern California Gas Company and Southern Counties Gas Company of California (the 'Southern California Companies'), which through their distribution systems supply natural gas for most of the domestic, commercial and gas requirements of Southern California, including Los Angeles, and with Pacific Gas and Electric Company ('Pacific'), which distributes and sells electric energy and natural gas throughout a large part of central and northern California, including the San Francisco Bay area. The other customers include Nevada Natural Gas Pipe Line Company, which serves Las Vegas, Nevada, and environs, and 64 customers in west Texas, New Mexico and Arizona, six of which purchase gas at field delivery points for use in carbon black

California, alone, consumes more natural gas than the Middle Atlantic states combined, more than half as much as the highly industrialized, thickly populated East North-Central states of Illinois, Indiana, Michigan, Ohio and Wisconsin, and as much as the seven states that make up the West North-Central area. Out-of-state deliveries to California averaged two billion cubic feet per day in 1959. At a price of slightly more than thirty cents per thousand cubic feet (Mcf), this business was worth then about $650,000 per day, and with increased deliveries it is expected that the California market will soon be a million dollar a day business.

Competition for the California Market.

Pacific's Planned Entry into the California Market.

The Pacific pipeline, as authorized and as constructed, was designed to serve the states of the Pacific Northwest and the Rocky Mountain area. The system map (Exh. 1, facing R. 565; R. 1063) discloses a proximity and, accordingly, an ability to furnish natural gas to California and competition to El Paso. Pacific was conceived upon the ultimate hope and expectation of transmitting Canadian gas to California and to eastern markets. Ray Fish, organizer of Pacific and former chairman of its board of directors, testified that in early 1956 he had explored the

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plants and miscellaneous field purposes. The other 58 customers include utility companies and municipalities purchasing gas for distribution to approximately 385,000 gas customers, utility companies purchasing gas for use in the generation of electric power, copper mining and other mining companies, and various other industrial consumers. Of the total revenues to the Company from the sales of gas during the twelve months ending April 30, 1956, revenues from gas sales to the Southern California Companies and Pacific amounted to 37.65% and 36.50%, respectively, while the revenues from gas sales to the five largest of the above-mentioned 64 customers were 6.69%, 2.69%, 2.07%, 2.03% and 1.23%, respectively." (R. 611)

possibility of serving the Chicago market. In May of 1956, Mr. Fish entered into preliminary negotiations with the Southern California Edison Company, a large California electric company, with a view to transporting and selling Canadian gas to Edison (R. 243-244). Speaking of a possible pipeline to California, Fish further stated:

> "Why, we most certainly could have financed a line, because any line that we would have undertaken would have had to have been economically feasible. Therefore, we could have financed it.
>
> "I have never entered into a contract that I have not or could not finance.
>
> "Mr. Kurtz: Yes. And even when you were negotiating for the sale of that gas to the California markets there was no doubt in your mind that you could finance that pipeline, was there?
>
> "The Witness: No, sir, because the type of contract I would have with my customer companies would be such on which I could finance.
>
> "Mr. Kurtz: That is right.
>
> And did you at this time also discuss with your finance people your proposals to build lines to the California market?
>
> "The Witness: I believe our main investment house knew about it—Mr. Kiernan, of White, Weld, who is now a special partner of it.
>
> "I mean, I think we discussed it casually with him.
>
> "Mr. Kurtz: And did Mr. Kiernan at any time discourage you on the grounds that you could not finance such a project?
>
> "The Witness: Not that I remember. In fact, there was not any doubt in my mind. It might have been hard to do, but again, it would be based on making a suitable contract with the market company that would make a line economically feasible, and then you can finance it." (Fish, R. 270-271.)

Illustrative of Pacific's opinion as to the California market is the statement contained in the minutes of the special meeting of the board of directors of Pacific held on February 22, 1956, wherein these comments concerning a merger with El Paso were noted:

> "A full discussion ensued, in which the various advantages and disadvantages of such a merger were discussed * * * . Such a hearing would involve an expenditure of large amounts of time and money at a critical period in the corporation's existence; i.e., during the period it was organizing its personnel and preparing for the commencement of gas sales. It was suggested that preliminary investigation had disclosed that *there would be considerable opposition on the part of the Federal Power Commission to such a merger. Opposition had also been indicated from the market areas of California and the Pacific Northwest. It was felt that the corporation should not incur opposition from its markets at the present time, when the corporation is greatly dependent upon their support.*" (Emphasis supplied.) (R. 960-961)

Pacific, it is to be noted, placed California in its market area.

The Negotiations to Enter the California Market.

In May of 1956, negotiations commenced between Ray Fish, of Pacific, and Harold Quinton, of the Southern California Edison Company. Quinton was interested in obtaining a direct supply of gas for Edison, and negotiations seeking to furnish 300,000,000 cubic feet of Canadian gas to Edison were undertaken. Cost estimates were made, and on July 30, 1956 a preliminary letter agreement was entered into between Pacific and Edison, providing for delivery of 300,000 cubic feet per day at the Oregon-California border, beginning November 1, 1959 (R. 243-244).

Initially, Edison would have been unable to utilize the entire 300,000,000 cubic feet of gas, and it became apparent that the cooperation of the California distributing companies would be required to provide an initial market (R. 244-245). Quinton solicited the Southern California Gas Companies (Pacific Lighting group) and the Pacific Gas and Electric Company, the two largest California gas distributors, and El Paso's largest customers. In August of 1956, both companies rejected the proposal (R. 247). It may be fairly inferred that El Paso made known to the California gas distributing utilities its opposition to such a project (R. 404).

El Paso's Suppression of Pacific's Competition.

Paul Kayser, president of El Paso, aware of such efforts, flew to California in the fall of 1956 and discussed with Harold Quinton of Southern California Edison Company the offer of Pacific to serve Edison (Kayser, R. 399). Kayser advised Quinton that any arrangements with Fish "*would not be in the public interest.*" (Emphasis supplied.) Kayser told Quinton that he would oppose any purchase which did not take into account the fact that Edison was a customer of the Pacific Lighting Group gas companies (Kayser, R. 401). The project was not consummated!

The fact of actual competition between Pacific and El Paso is demonstrated by the record. Pacific was conceived by its promoters as being a future supplier to the California gas market. Pacific took specific action to accomplish projects leading to gas sales to California public utilities. The fact of competition furnished by a separate and an independent Pacific was freely conceded by El Paso.

As stated in the record by Paul Kayser, president of El Paso:

"Q. Now, as I understand it, prior to your acquisition of the stock of Pacific, you were in competition—there was competition between Pacific Northwest and El Paso for certain markets in the State of California.

"A. That is right. We were both trying to sell specifically Pacific Gas and Electric Company quantities of gas." (Kayser, R. 308)

Other Competitive Activity.

During the life of Pacific as a separate, independent corporation, Pacific was caught up in a web of competition with El Paso. The record is replete with instances of El Paso's economic power, coming from a position of dominance as California's sole out-of-state gas supplier, being asserted in contests with Pacific.

For example, one of the pipeline corporations referred to in the record, West Coast Transmission, Ltd. (West Coast) had, on June 16, 1952, obtained authority from the Province of Alberta to export gas into the United States from western Canada. Negotiations were conducted between West Coast and Pacific, leading ultimately to a contract between the two corporations, whereby West Coast would deliver to the border and Pacific would pick up initial deliveries of 200,000 Mcf per day for ultimate delivery to the California market. (Ex. 208, R. 737-762) El Paso asserted itself into this arrangement and secured an agreement with West Coast and Pacific. The construction placed upon such agreement, is outlined in Pacific's letter to stockholders of December 22, 1954 (Ex. 371, R. 857-860):

"This tri-party deal will benefit all concerned. It will give Westcoast what they have been fighting for—a pipeline. It will mean that Pacific will expand its facilities, be a larger company, will protect its market from future competition by a Canadian pipeline and it

caused the dismissal of the law suit of Westcoast against Pacific's present certificate. *It means that El Paso's California market will be protected against future competition* • • • ." (Emphasis supplied.)

In short, by the agreements reached, El Paso sought to quell the competition of Canadian gas from Pacific and, indeed, the last paragraph of the letter referred to above makes reference to the tri-party agreement—in these terms:

"• • • we believe that the 'treaty' which we have entered into will solve the major problems which have been confronting us."

Despite this "treaty" arrangement, Pacific made continued efforts to reach the California market, and Ray Fish characterized Pacific's ability to furnish gas to the California market in these terms:

"I don't see how any pipeline to California markets from Canada can go through Pacific's territory and get to any California market cheaper than what Pacific can render that service for in the Northwest area." (R. 262)

Up until the time of the stock transfer by the stockholders of Pacific to El Paso, Pacific made efforts to sell gas to California (R. 261-262).

Competition for Gas Supplies.

Control of a reliable gas supply is, of course, essential to a gas transmission company. There are many instances in which the economic strength of El Paso asserted itself in competition for critical gas supplies. This had the effect of both keeping these reserves from competitors and preventing these competitors from entering El Paso's California market area.

In the Aneth Field of the Southwest, the promoters of the Transwestern Pipeline Corporation sought sufficient gas supplies to support the granting of a certificate to construct a pipeline to California. El Paso, by bidding away from Transwestern the Aneth supply, reduced and made more difficult the reality of Transwestern's obtaining a certificate. (R. 472-480)

Tennessee Gas Transmission manifested a desire to build a pipeline to California. El Paso, by bidding for gas reserves in the Big Piney area of the Rocky Mountains, obtained a supply of gas therein at a price of 18½ cents, thus establishing a new high for gas purchased in that area. Any potential competitor seeking to construct a pipeline to California, as did Tennessee Gas Transmission, was handicapped, even precluded from obtaining a sufficient gas supply to support a certificate showing, by having the gas bid away from it by El Paso at new high area prices (R. 336).

El Paso's economic power appears in opposition to the then only contemplated Pacific Gas Transmission Company pipeline to run from western Canada to northern California. Pacific Gas Transmission, in order to obtain a certificate, was required to obtain and to show sufficient gas reserves to support such project. Asked whether El Paso would oppose the Pacific Gas Transmission line, this reply was given:

> "The Witness: Oh no. I would say that as to a given piece of gas in Canada—and this has already happened —where Pacific wants to buy it, Pacific Gas and Electric Company wants to buy it, and I need to buy it for the needs of my customers, *I am going to compete to buy.*" (Emphasis supplied.) (R. 149)

The bidding of gas reserves to new price highs only served as an upward push upon the price of a vital com-

modity, at an ever increasing, burdensome and unnecessary cost to ultimate consumers. The ability to make and to meet new, historic high prices is closely related to the economic power of El Paso.

EVENTS LEADING UP TO THE MERGER

Background of the Stock Acquisition.

Pacific, formed in 1949, filed its first applications with the Federal Power Commission in June of 1950. Its initial certificate authority was granted on June 18, 1954, and in April, 1955 Pacific's initial financing was complete[2] (R. 254).

In June of 1955 construction of the Pacific pipeline commenced and in 1955 offers by way of merger were made from El Paso to Pacific. The initial offers were rejected, but ultimately the offer which was accepted was so attractive that Pacific surrendered its ownership to El Paso.[2]

Pacific commenced test deliveries to certain customers in August of 1956.

As hereinbefore related, during most of the corporate history of Pacific it made real efforts to enter the California market, as well as other areas in which it could furnish competition to El Paso. As previously related, Pacific attempted to secure long-term gas purchase contracts with California gas and electric distributing utilities, and in August of 1956 Paul Kayser, president of El Paso, learning of such negotiations, persuaded the California utilities to terminate negotiations with Pacific (R. 125-126, 308-309, 398-404, 406).

The prospectus of July 31, 1956 filed with the Securities and Exchange Commission by El Paso is a persuasive docu-

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2. In connection with the management of Pacific prior to stock acquisition, the record shows the following holdings of Pacific common stock by Pacific's management (R. 660):

ment in support of the stock acquisition. The prospectus recites in detail the business of each corporation, sets forth the terms of the stock exchange offer, and states:

> "Operation of Pacific after the Exchange Offer
>
> If the exchange offer is successfully consummated, it is expected that Pacific will continue to be operated as a separate corporation, and the management of the company has no present intent of merging Pacific into the company or having the company acquire Pacific's assets." (R. 666)

The prospectus also discussed the application of the anti-trust laws to the proposed acquisition of the common stock of Pacific and stated:

Directors and Officers of Pacific	Common Stock of Pacific
Clyde H. Alexander, Director	715
Arthur B. Allyne, Vice President	500
J. M. Clark, Vice President	2,000
Ray C. Fish, Director and Chairman of the Board	118,892
Alfred C. Glassell, Jr., Director	98,212
Robert R. Herring, Director	20,000
Allen B. Hyatt, Vice President	100
Norman V. Kinsey, Director	25,000
Leon M. Payne, Director, Vice President and Secretary	15,045
Franz Schneider, Director	19,157
Charles K. Schwartz, Director	5,157
Stuart F. Silloway, Director and President	2,100 (1)
C. A. Watson, Treasurer and Assistant Secretary	700
C. R. Williams, Director and Vice Chairman of the Board	52,599

(1) In addition Mr. Silloway is entitled under a subscription agreement entered into with Pacific on October 9, 1956 to purchase from Pacific 30,000 shares of its Common Stock at $31 per share. Mr. Silloway also has a stock option for the purchase of 30,000 shares of Common Stock of Pacific, exercisable 6,000 shares annually on or after June 15 of each year from 1957 to 1961 and terminating as to any unexercised portion on July 15, 1961, at the option price of $27.79 per share. Discussions are presently under way between the Company and Mr. Silloway contemplating an arrangement whereby if the proposed exchange offer is consummated Mr. Silloway may be afforded an opportunity to exchange for shares of Common Stock of the Company, on a ratio no more favorable to Mr. Silloway than the exchange offer, any shares of Common Stock of Pacific he may acquire as a result of the exercise of his said stock option.

"• • • (T)he antitrust questions raised have no controlling precedent and are original, significant and difficult ones which may require extensive hearings, proceedings, and examination and cross-examination of witnesses and experts to resolve. Counsel concludes that while the matter is not entirely free from doubt, it is their opinion that the proposed transaction is not in violation of the antitrust laws presently in effect as so far construed by the courts. The opinion states that it is rendered on the assumption that after full investigation, the purpose of the transaction would continue to prove to be as previously indicated • • • ." (R. 657)

On November 8, 1956 El Paso entered into a stock exchange agreement with Pacific, and by May 1, 1957 El Paso had acquired 99.8 per cent of the outstanding stock of Pacific (Ex. 386, R. 939-1005, R. 84, 652, 653, 696).

On December 31, 1956 the Securities and Exchange Commission wrote a letter to El Paso as to the stock acquisition and possible violation of the antitrust laws. In response thereto El Paso stated that on November 15, 1956, Paul Kayser, president of El Paso, and Arthur Dean, of Sullivan and Cromwell, attorney for El Paso, met with the Attorney General of the United States and members of his staff and submitted certain information to them. On the same day—November 15, 1956—Kayser had a conference with the Federal Power Commission (Kayser, R. 73).

The Stock Acquisition and the Price Paid.

In 1957, Pacific's records showed a loss of $2,067,000 (R. 394). Moreover, in order to merge, Pacific's bonds would have to be called. El Paso proposed to loan Pacific for this purpose the requisite $23,252,000 (R. 88). Pacific's

immediate prospects of earning a fair return were not good (R. 395).

Nonetheless, in order to acquire control of Pacific, El Paso issued five million of its shares. The dividend requirement on these shares was $1.30 each, or a total dividend requirement of $6,794,974. Pacific could not assist in meeting this requirement (R. 395).

El Paso considered that it was offering common stock having a pro forma market value of approximately $151,800,000 for Pacific's common.

On the basis of market quotations of January 2, 1957, which, of course, reflects El Paso's offer, Pacific's common had a market value of approximately $93,400,000. At this same time Pacific's common had a book value of approximately $29,770,131. Therefore, El Paso paid $132,029,869 for Pacific over book value, and in excess of $58,400,000 over market value. This acquisition had the effect of diluting El Paso's earnings available to its common stockholders, as reflected in Mr. Norwood's Exhibit 383. (Ex. 383, R. 902-923; Kayser, R. 394-396.)

The Management of Pacific After Stock Acquisition.

When the stock exchange offer was completed by May 1, 1957, El Paso had acquired 99.8 per cent of the outstanding common stock of Pacific. As a result of stock acquisition, El Paso took over the management and control of Pacific, and in its first initial and complete year of operation as a natural gas pipeline corporation Pacific was managed, controlled, and directed as to all of its policies and decisions—whether for profit or loss—by El Paso.[3]

3. THE COMMON DIRECTORATE.
Upon stock acquisition of Pacific these officers of El Paso and

Operating Experience of Pacific.

Pacific placed its initial facilities in operation on January 1, 1957, operating a natural gas transmission system consisting of approximately 2,125 miles of main and lateral pipelines, extending in a general northwesterly direction from the San Juan Basin in New Mexico through the States of Colorado, Utah, Wyoming, Idaho, and Washington to a terminus at the international boundary between the United States and Canada.

Pacific never operated as a separate, independent pipeline corporation. The timing of the stock exchange offer, its acceptance and completion placed Pacific under the control of the management of El Paso.

System Costs Not Covered by Revenues.

The record shows that Pacific, in operation as a subsidiary corporation owned, controlled, and dominated by El Paso, sold natural gas to other pipeline companies. These companies were Mountain Fuel Supply, Colorado Interstate Gas Company, and El Paso Natural Gas Company. Pacific did not recover the full cost of service for gas delivered to the other pipeline companies.

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directors thereof became officers of Pacific and directors thereof (R. 633, 1050).

	El Paso Management	Pacific Management
Paul Kayser	Director and President	Chairman of the Board and Director
Howard Boyd	Director, Vice President and Assistant General Counsel	Director and Vice-Chairman of the Board
A. R. Grambling	Director	Director
Frank Liddell	Director and General Counsel	Director
D. H. Tucker	Director and Vice President	Director
H. F. Steen	Director, Vice President and General Superintendent	Director
Lindsay Bradford	Director	Director
Fred T. Wagner	Director, Vice President, Associate General Counsel	Director
C. L. Perkins	Vice President and General Manager and Director	Director
Arnold R. La Force	Financial Vice President	Director

Exhibit 422, prepared by witness Simonds, of the Bureau of Gas Rates and Certificates of the Commission, disclosed undercharges to Colorado Interstate and Mountain Fuel Supply for the year 1958 of $5,478,675, and the amounts for each year through 1964, which total $32,993,307. These include the undercharges to El Paso commencing in the year 1960 (Simonds, Ex. 422, R. 1035).

The testimony of witness Copp, Vice President of Pacific in Charge of Rates and Sales, disclosed no reason why Pacific should not recover the full cost of service for gas sales to other pipeline companies. In accord is the testimony of Mr. Steen, Vice President and Manager of Pipeline Operation, and Mr. Silloway, a director of El Paso and Pacific and past president of Pacific.

The Pacific annual report to stockholders for 1957 discloses a revenue deficiency approximating $14,000,000 and a net loss of $367,005 for the year ended December 31, 1957, the first year of operation under the control of El Paso Natural Gas Company (R. 1049 et seq.).

The Decision to Merge.

Pacific operated as a separate pipeline corporation, but a subsidiary of El Paso, from January 1, 1957. On July 22, 1957, the United States of America, by complaint filed in the United States District Court for Utah, Central Division, charged that the purchase of Pacific stock by El Paso was a lessening of competition tending toward monopoly, in violation of Section 7 of the Clayton Act.

In order to avoid the possible consequences of the anti-trust action (R. 142-143), as the Commission found (R. 1183), on August 7, 1957 El Paso and Pacific filed their respective applications with the Federal Power Commission, seeking administrative approval under the Natural Gas Act for the acquisition by El Paso of the assets of Pacific.

Summary of Events.

Date	Event
June 28, 1950	Pacific files its first application with FPC.
June 18, 1954	Pacific granted a certificate as requested.
1955	El Paso negotiates for acquisition of Pacific.
May, 1956	Pacific negotiates to sell gas to California utilities.
August, 1956	Kayser of El Paso persuades California gas utilities such arrangements with Pacific "would not be in the public interest."
July, 1956	El Paso prospectus sets forth terms of stock exchange offer and advises that Pacific will operate as a separate corporation.
November 8, 1956	Pacific and El Paso stockholders agree upon terms of the stock exchange offer.
November 15, 1956	Kayser and Arthur Dean of El Paso meet with the Attorney General of the United States concerning antitrust violations; Kayser and Dean meet with the Federal Power Commission.
December 31, 1956	The SEC inquires by letter as to possible violations of the antitrust laws because of the stock acquisition.
January 1, 1957	Pacific becomes operational.
July 22, 1957	The United States Attorney General commenced an action against El Paso and Pacific under Section 7 of the Clayton Act (Act of Oct. 15, 1914, c. 323, § 7, 38 Stats. 731; as amended Dec. 29, 1950, c. 1184, 64 Stats. 1125; 15 U.S.C., § 18), alleging that by its purchase of Pacific stock El Paso was lessening competition and tending to create a monopoly (*United States v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation*, Civil Action No. 143-57 U.S.D.C. for Utah, Central Division).

Dates	Events
August 7, 1957	El Paso and Pacific filed application with the Federal Power Commission seeking approval and authority for the acquisition by El Paso by merger of all of the facilities of Pacific (R. 1071, 1087).

THE PROCEEDINGS BEFORE THE COMMISSION

The Administrative Hearings.

By applications filed on August 7, 1957, by the El Paso Natural Gas Company and the Pacific Northwest Pipeline Corporation, approval was requested of the Federal Power Commission of the acquisition by El Paso by merger of all of the facilities of Pacific Northwest (R. 1071-1111).

By Notice of Intervention, filed on August 27, 1957, California intervened in said proceedings. On September 8, 1958, California filed a "*Motion on Behalf of the Attorney General of the State of California to Stay Proceedings*" (R. 1135-1145). *California asked the Commission to delay the administrative proceedings until such time as the antitrust issues of the case were resolved by a Federal court.* On September 15, 1958, the Commission denied the Motion (R. 1135-1145). Hearings commenced before the Commission on September 17, 1958 (R. 1156). Presiding Examiner Kelly issued his decision on November 20, 1959 (R. 1149-1240), and California filed exceptions thereto (R. 1277-1289).

On December 10, 1959, the Commission heard oral argument. At oral argument applicants made plain their anxiety for a quick decision.

> "We are full[y] conscious of the many pressing demands upon the Commission's time, but we urge you to act promptly and early next week if possible. We need

all the time you can give us in order to take the numerous steps involved in the consummation of the merger by December 31, 1959, which will avoid the loss of a $9,000,000 tax loss carry-over." (Reporter's Transcript of Oral Argument, pp. 2935 and 2936.)

In response to the request for so quick a decision, the attorney for California stated in reply:

"And please, gentlemen, we are not anxious for a decision within a week, not a week, not on a matter so grave as this." (Reporter's Transcript of Oral Argument, p. 3019.)

In closing, counsel for applicants requested:

"* * * and again I would like to urge you to adopt that decision and do so at your earliest convenience, so that we can take advantage of that tax loss carry-over * * *" (Reporter's Transcript of Oral Argument, p. 3093.)

Thirteen days thereafter, on December 23, 1959, the Commission issued its Order Issuing Certificates of Public Convenience and Necessity Authorizing Merger with Conditions and Adopting with Modifications the Decision of the Presiding Examiner (R. 1290-1310). On January 20, 1960, within thirty days of the Commission's order, as required by Section 19(a) of the Natural Gas Act, California filed with the Commission a Petition for Rehearing and, at the same time, requested that the decision be stayed pending disposition of the petition (R. 1340-1353).

On February 17, 1960, the Commission issued its Order Denying Petition for Rehearing and Stay (R. 1353-1358).

Within sixty days after the order of the Commission denying rehearing, California filed with this Court its Petition for Review, pursuant to Section 19(b) of the

Natural Gas Act. The treatment then to be accorded the voluminous record before the Commission and the time required for consideration consistent with due process was one of the issues posed to the Commission at the time of oral argument.

The Order of the Commission.

On December 23, 1959, the Commission made its order issuing certificates of public convenience and necessity authorizing the merger (R. 1290-1310). The order adopted the Presiding Examiner's decision. *It rejected the Commission staff position "that the necessary showing to justify the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act has not been made."* (Emphasis supplied.) It stated: "We shall adopt the reasoning of the Presiding Examiner as set forth in his decision and discussed briefly below in the light of the exceptions." (R. 1291)

The Commission agreed with the applicants' theory that approval of the proposed merger might reasonably bring about the benefits predicted. However, it refused to consider the questions presented by the consumer interests as to the effect the merger might have upon rate structures. The Commission stated, "Any effect which the merger may have on rates is not before us at this time." (R. 1303-1304) The order found that the merger would result in savings that will tend to lower rates or prevent them rising more than they would otherwise. To the objection of California and the staff of the Commission that the Examiner did not take into account the shifting of costs from Pacific to El Paso customers, the Commission agreed with the Examiner that the issue was not before them at this time but "is one for a rate proceeding" (R. 1303-1305). The Commission found

that the merger will result in "lower rates" (R. 1303), and existing rates would be unaffected by the transaction.

As to the antitrust issues before the Commission, both the Presiding Examiner and the Commission furnished such competition as would be necessary to defeat a position of unlawful monopoly by El Paso by a curious use of the device of official notice. The Commission found that competition existed for the California market because of the existence of the Transwestern Pipeline Corporation and the Pacific Gas Transmission Pipeline Corporation. Neither of these projects were realities. The hearings relating to the application of the Pacific Gas Transmission Company were yet uncompleted and the proceedings with reference to Transwestern were still in process long after the merger proceedings had been submitted. Both of these other projects were no more than pending application proceedings.

The Examiner found, and the Commission adopted this finding, that "On July 16, 1957, the boards of directors of both El Paso and Pacific formally authorized the filing with the Commission of the applications here for certificate authority for El Paso to acquire Pacific's facilities by means of the proposed merger. El Paso's President admitted, on cross-examination, that the decision to file these applications was 'considerably stimulated by the fact that the Attorney General of the United States was prepared to file an antitrust suit against us.' The antitrust action filed against El Paso and Pacific, hereinbefore discussed, was filed on July 22, 1957. The applications of El Paso and Pacific were filed here on August 7, 1957."

The Examiner and the Commission, in discussing Commission authority with reference to antitrust violations, then held:

"This shows a positive legislative intent to permit mergers of natural gas companies, when found by the Commission to be in the public interest, *even in the presence of the things sought to be prevented by the Clayton Act.*" (R. 1183) (Emphasis supplied.)

The Remarks of the Presiding Examiner Subsequent to this Proceeding.

On March 14, 1960, in a hearing before the Commission held at Washington, D. C., in that proceeding entitled "In the Matter of Panhandle Eastern Pipe Line Company, Docket No. G-19780" the Presiding Examiner stated this:

> "I just got through writing a decision back in November in the El Paso merger case, where it absorbed the Pacific Northwest Transmission Company. No intervenor opposed the merger except the State of California. The only issues the State of California made at the outset of the hearing was, we don't want just one pipeline bringing gas into the State of California.
>
> • • • • • • •
>
> "There were 71 Items by Reference, making an equal 500 documents that were to be considered in that case.
>
> "I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.
>
> "Now, that is what I am talking about, all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are."

Disclosures Subsequent to the Merger Proceedings.

Following the disposition of the merger proceedings by the Commission, hearings were held in May 1960 before the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of Representatives of the United States, relating to Federal Power Commission matters. The testimony before that Subcommittee disclosed that during the period of time the merger applications and proceedings were before the Commission, telephone calls and visits were made upon certain Commissioners who participated in the decision by representatives of applicants.

Social contacts during the pendency of these proceedings were also recited.

Upon one occasion applicants' representative requested a Commissioner "to hurry some cases along." (R. 1375) On another occasion it was stated, with reference to El Paso's representative, "He does come into the office occasionally, in which usually a matter of expediting, getting cases going, would be mentioned." (R. 1417) It should be pointed out that as to most of these meetings no recollection remained as to the conversations which occurred or, when it did, memory dictated that the merits of cases were not discussed. The expedition of matters before the Commission was discussed, however. And some matters were discussed; "I don't believe that he ever discussed any business matter with me on more than two or three occasions." (R. 1421)

The precise dates of office visits, telephone calls, social engagements—all of these are set forth in the reporter's transcript of the hearings before the Subcommittee (R. 1367-1433).

Summary of Argument

The Commission had no jurisdiction to determine the legality of the stock acquisition which was antecedent and incident to the proposed asset acquisition. Since the stock transaction was challenged by the Department of Justice as unlawful, the Commission should have continued its proceedings until the lawfulness of the stock acquisition had been determined by the authority competent to resolve the issue. Failure to do so has resulted in a lack of uniformity of enforcement of the laws, and has in effect divested the Department of Justice and the federal judiciary of jurisdiction with no legislative mandate to do so.

The Commission abdicated its responsibility under the Natural Gas Act in failing to consider the economic impact of the merger upon the rates to be charged customers of the merged systems. In failing to consider the rate issue, the Commission failed to give effect to the Congressional interpretation of the requirements of Section 7, and its own regulations promulgated under the Natural Gas Act. The impact of costs inhering in certifications under Section 7 of the Natural Gas Act has long been interpreted by the agency to be a material consideration in such proceedings. The Commission's unrealistic and arbitrary divorce of the questions of rates and costs from the merger proceedings failed to give effect to this Court's mandate to "hold the line" on costs.

The Commission denied California a fair hearing in arbitrarily ignoring evidence which concededly was relevant and material to the issues involved in this case. The Commission denied California a fair hearing in failing to indicate the degree of relevance and materiality of the plethora of factual issues which it allowed applicants to develop. The Commission denied California a fair hearing in giving an

unrealistic meaning and effect to asserted facts of which it improperly took official notice, and in so doing failed to give California an opportunity to controvert such facts.

Such findings as the Commission made consist only of glittering generalities, and are unclear and incomplete.

In failing to enforce and implement its adopted standards of ethical conduct, the Commission has allowed itself to become the target of suspicion and distrust. By allowing frequent informal ex parte approaches, the Commission has placed California in the position of not knowing what evidence or arguments, whether procedural or substantive, were made to individual Commissioners by representatives of the litigants before it. California has a right to expect the Commission to enforce its own rules. For it to fail to do so is to deny California a fair hearing.

I.

THE DECISIONS OF THE COURT BELOW AND OF THE FEDERAL POWER COMMISSION FAIL TO ACCOMMODATE THE COMPLEMENTARY POLICIES UNDERLYING THE CLAYTON AND THE NATURAL GAS ACTS.

A. Prior Resolution of Antitrust Questions by the Courts Is Essential to Commission Action.

The Commission's failure to await the determination of the antitrust suit instituted against the El Paso Natural Gas Company resulted in a premature determination of the issues involved in the court case by a tribunal which did not have statutory jurisdiction to determine them. In deciding the case in this manner, the Commission has subjected the customers of the merged El Paso company to rates, charges and service flowing as a result of a potentially illegal combination. The consumer has thus been required to hedge management's bet that the risk of illegality will eventually be obviated.

The Commission's action has brought about great uncertainty in the law; conduct which would normally be suspect because prima facie violative of the antitrust statutes may, or may not be innocent because otherwise required by the public convenience and necessity. Therefore, the seemingly overlapping jurisdictions of the Department of Justice and the Federal Power Commission should be clearly delineated, and an order of precedence should be established.

1. THE UNDERLYING POLICY.

It is the aim of both the Clayton Act and the Natural Gas Act to protect the consumer from exploitation at the hands of corporations or individuals who have amassed great concentrations of economic power. The purpose of the antitrust acts is to preserve to the people governmental protection against the evils attendant upon unrestrained monopoly. Absence of competition offers the monopolist the power to charge the public all the traffic will bear. Congress intended to protect the public from this evil by preserving free and unfettered competition as the rule of trade.[4]

While the method of regulation under the Natural Gas Act differs from that under the antitrust acts, the purpose of such regulation is the same. Regulation of the natural gas pipeline industry has been declared by Congress to be necessary in the public interest,[5] for prior to enactment of the Natural Gas Act, 56% of all natural gas transmitted in interstate commerce was controlled by four holding companies and fifteen companies controlled 81% of the transmission.[6] Thus, one of the evils against which the Natural

4. Northern Pacific R. Co. v. U.S., (1958) 356 U.S. 1.

5. § 1(a) Natural Gas Act, Act of June 21, 1938, c. 556, § 1; 52 Stat. 821; 15 U.S.C. § 717(a).

6. S. Doc. No. 92, Part 84-A, 70th Cong., 1st Sess.

Gas Act was directed was the control of that industry by a few. The primary purpose of the Act was to protect the "consumer interests against exploitation at the hands of private natural gas companies."[7]

2. ADMINISTRATION AND ENFORCEMENT OF THE TWO ACTS.

While the Natural Gas Act endows the Commission with power to authorize acquisitions of the assets of one natural gas pipeline company by another, it does not give the Commission any power to enforce the antitrust acts. This function is left with the Department of Justice, and the Federal courts.[8] Indeed, that this jurisdiction is intentionally withheld from the Commission and left with the government and the courts is fortified by the fact that the Commission's sole function with respect to possible antitrust violations is to transmit to the government information which it thinks might indicate possible violations.[9] Section 20(a) of the Natural Gas Act, grants to the Commission power to seek injunctive relief from the United States Courts where it appears that the Natural Gas Act is being or may be violated, but where the Commission has cause to believe that the antitrust acts are being violated, its course is to transmit such information as may be relevant to such violations to the Attorney General. Section 20(a) provides as follows:

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the

7. F.P.C. v. Hope Natural Gas Co. (1944) 320 U.S. 591.

8. Act of October 15, 1914, c. 323, § 15; 38 Stat. 736; 15 U.S.C. § 24.

9. § 20(a) Natural Gas Act; Act of June 21, 1938, c. 556, § 20(a); 52 Stat. 832; 15 U.S.C. § 717s(a).

United Stat[illegible] * * * to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder. * * * *The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.*" (Emphasis added.)

3. ANTITRUST PROBLEMS UNDER THE NATURAL GAS ACT.

It has been determined that the Commission has some duty to consider the national antitrust policy as bearing upon questions arising before it under Section 7 of the Natural Gas Act. Where a private litigant protested the abandonment of a natural gas pipeline and its diversion to use as a petroleum products line, it was held that the Commission could not ignore the possibility of monopolistic tendencies and the suppression of competition which inhered in the case.[10] However, it has not been decided what the Commission's duty is when factors inherent in an application to it under Section 7 of the Natural Gas Act are the subject of a pending antitrust action. Nor has it been decided to what extent factors inhering in antitrust situations, such as restrictive combinations and the wilful suppression of competition, may have bearing upon the public convenience and necessity, assuming it to be proper even to entertain an application by interests accused of having violated the antitrust laws. It is clear, however, that some duty to do so exists. Despite the formally extensive scheme of regulation instituted by Congress, the Commission cannot infer therefrom a Congressional intent to initiate a system of natural gas monopolies.[11]

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10. City of Pittsburgh v. F.P.C., (CADC, 1956) 237 F.2d 741.

11. Panhandle Eastern Pipeline Co. v. F.P.C., (CADC, 1948) 169 F.2d 881.

4. COORDINATION AND ENFORCEMENT.

Proper coordination of administration and enforcement of the two acts, under the existing statutory framework, demands that the Federal Power Commission defer consideration of applications to it under Section 7 of the Natural Gas Act when the subject matter of such applications is the gravamen of a pending antitrust suit by the Department of Justice.

The Commission has no jurisdiction to pass upon the lawfulness of stock acquisitions which are antecedent and incident to acquisitions of natural gas facilities for which its approval is sought.[12] Consequently, never at any time, throughout the proceedings before the Commission, nor to date, has there been an exploration of a determination of the lawfulness of the stock acquisition of Pacific by El Paso. This is so, even though there is substantial evidence of record that the acquisitions of Pacific's stock and facilities was part of an overall plan aimed to suppress competition both in the California market, and in the Rocky Mountain and Canadian gas fields. This is so, in the face of an express finding by the Commission that its administrative blessing was sought primarily to avoid prosecution by the government under the antitrust laws. In the light of this evidence, it is difficult to see how the Commission could therefore find that the applicant was "able and willing * * * to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder * * *" (R. 1306) when the applicant was accused of attempting to subvert the policies of both the Clayton and the Natural Gas Act, i.e., protection of the consumer against exploitation.

12. City of Pittsburgh v. F.P.C., (CADC, 1956) 237 F.2d 741.

In order to find that the applicant was "willing to conform to the requirements of the Natural Gas Act," as is required of the Commission by Section 7(e) thereof, a determination of the lawfulness of the applicant's premerger activities would appear necessary. The Commission has no power to make such a finding. Jurisdiction to make such a determination resides in the federal courts, and it is recognized that special competence in the interpretation of the antitrust statutes is vested in the Attorney General.[13]

It is axiomatic that where questions of complex technicality are involved, it is appropriate to defer consideration of the case involving such questions until that agency or tribunal possessing the requisite expertise has had an opportunity to resolve them.[14] While this principle has usually been applied in cases where it would be most appropriate for an administrative agency to pass upon technical questions, it is equally applicable where the special competence lies with the Attorney General and the courts. In such a case primary jurisdiction should remain with the courts, and especially is this so where, as here, the court has already assumed jurisdiction.

It is said that the doctrine of primary jurisdiction is essential to the uniform enforcement of federal law.[15] If the decision of the Commission as affirmed by the Court below is here affirmed, enforcement of the antitrust law will be anything but uniform. As the decision stands, neither the regulatory agency, the parties it regulates, nor the consumers they serve can determine what standard of conduct shall be demanded of interstate pipeline companies with respect to industry-wide competition.

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13. Ibid.

14. Texas & Pacific R. Co. v. Abilene Cotton Oil Co. (1906), 204 U.S. 426.

15. Ibid.

It would appear to depend upon which forum was successfully first stirred to action. If the government can institute suit quickly enough, and prosecute vigorously enough to obtain court action before a defendant can file his application with the Commission, the standards hitherto traditionally developed by the court, by a painstaking process of inclusion and exclusion will be applied. But if the pipeline company be nimble, the agency will be allowed to proceed first, ignorant of whether the antitrust laws have been violated, without power to determine whether in fact they have or have not been, and in some vague way, consider what bearing the policy in favor of free competition has upon the public convenience and necessity.

Once the Commission has acted, as here, can it realistically be said that the government's antitrust case is still viable? While the effect of the Commission's decision as *res judicata* upon the issues remaining in the antitrust case is conjectural, nonetheless realism compels the conclusion that, save in rare instances, most judges, for practical considerations, would not be receptive to cumulative litigation. What remedy is left the District Court to impose once the Commission has authorized an acquisition of assets? Assuming the District Court to be without power to order the separation of the merged facilities because of the exemption clause within Section 7 of the Clayton Act (See App. A, p. 3) where is the efficacy in an order to divest worthless stock?

Practically, then, if these decisions stand, the Federal Courts and the Attorney General have been divested of their jurisdiction to enforce the antitrust acts. The Federal Power Commission has been invested judicially with power to preclude enforcement by those agencies entrusted with such power.

This is not uniform enforcement of the law, but is sporadic action which in effect grants an immunity from operation of the Clayton Act which Congress never intended.

5. STATUTORY HISTORY OF SECTION 7 OF THE CLAYTON ACT.

The premature consideration of these issues by the Power Commission cannot be upheld upon the ground that the Clayton Act provisions have been superseded by the Natural Gas Act.[16] Section 20(a) of the latter statute compels the conclusion that Congress fully intended that the corporations subject to the jurisdiction of the Power Commission should continue to be required to measure up to the standards of conduct imposed by the antitrust statutes.

Nor can it be said that Congress, in enacting the exemption provision in Section 7 of the Clayton Act, intended to confer upon the Power Commission jurisdiction to immunize transactions otherwise unlawful as violative of the antitrust statutes. An example of a case wherein the power to immunize *was* conferred is *McClean Trucking Co. v. United States*, 321 U.S. 67 (1943). It was there held that the Interstate Commerce Commission had the power to approve a merger of common carriers which in the absence of such approval would be violative of the antitrust laws. Significantly, however, the Interstate Commerce Commission is specifically enjoined by the terms of its basic statute to approve such mergers as "will not unduly restrain competition" (Section 5(1) Interstate Commerce Act).[17] Moreover, Section 5(11) of the Interstate Commerce Act explicitly provides,

> "(11) The authority conferred by this section shall be *exclusive and plenary*, * * * and any carriers or other corporations, and their officers and any other persons,

16. *Cf.* U.S. Navig. Co. v. Cunard S.S. Co., (1931) 284 U.S. 474.

17. Act of Feb. 4, 1887, as amended, § 5; 24 Stat. 380; 49 U.S.C. § 5(1).

> participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints*, limitations, and prohibitions of law, Federal, State, or municipal, in so far as may be necessary to enable them to carry into effect the transaction so approved or provided for * * *"[18] (Emphasis added.)

Nowhere in the Natural Gas Act is the Federal Power Commission's power to determine whether a given transaction unduly restrains competition evident. Nor does the Natural Gas Act endow the Power Commission with power to immunize a transaction from the restraints of the antitrust laws. If the Congress had meant the Commission to have this power, it seems clear that it would have incorporated language in the Natural Gas Act which would have spelled it out.

The exemption provision of Section 7 of the Clayton Act, (See App. A, p. 3) provides that transactions approved by the Federal Power Commission, *in the exercise of its jurisdiction*, shall be exempt from the operation of the Clayton Act, Specifically, this clause provides, in pertinent part, that,

> "Nothing contained in this section shall apply to transactions *duly* consummated pursuant to authority given by the * * * Federal Power Commission * * * *under any statutory provision vesting such power* in such Commission, Secretary or Board."[19] (Emphasis added.)

In using the words "such power", Congress had reference to express statutory powers already given, or subsequently

18. Ibid, § 5(11); 24 Stat. 380 as amended; 49 U.S.C. § 5(11).

19. Act of October 15, 1914, c. 323, § 7; 38 Stat. 731, amended December 29, 1950, c. 1184; 64 Stat. 1125-1126; 15 U.S.C. § 18.

to be given to the named agencies to give immunity from the antitrust laws to mergers they had approved. "Such power" is exemplified by the power existing in the Interstate Commerce Commission to immunize transactions from the operation of the antitrust laws by virtue of Section 5(11) of the Interstate Commerce Act. The purpose of the exemption provision was merely to preserve to the agencies such jurisdiction as they already possessed, or might possess, and was not to give to the agencies powers which they did not possess.[20]

The Court of Appeals has treated El Paso's acquisition of stock as an acquisition of assets. In so doing, it has treated the entire proceedings prior to the merger of El Paso and Pacific as an integrated transaction. If the acquisition of stock is considered part and parcel of the asset acquisition which the Power Commission approved, then it follows that the Power Commission has approved the stock acquisition and declared it to be lawful notwithstanding the outstanding Clayton Act charges. Thus, by judicial decree, the Power Commission has been permitted to do by indirection what it had no jurisdiction to do directly. This is not accommodation of complementary legislative policies, but rather it is judicial amendment of the statutes.

6. SOME PRACTICAL OBSERVATIONS COMING FROM THE CONFUSION OF AUTHORITY.

The present posture of the case, with the Commission decision having been affirmed upon appeal, creates a dilemma between two agencies of government. The contest for authority between two warring factions of government catches the interest of the public, between the two.

California maintains that the authority vested in the Department of Justice and the courts is clear. California

20. S. Rep. 1775, 81st Cong., 2d Sess.

also maintains that this Court cannot ignore practical observations and comments which are most germane to a disposition of this problem.

Going back to the time of the original enactment of the monopoly statutes, it is seen that, historically and consistently, Congress has placed the enforcement thereof in the Department of Justice. The word "appropriation" is a meager one to describe the consistent and historic expenditure of sums of money to recruit a complement of personnel whose sole function it has become, within the Department of Justice, to police business activities under the monopoly laws.

The Department of Justice has within it a special division known as the Antitrust Division. Here resides that continuity of specialized experience, training, knowledge, and skill which has developed and which exists to protect the public from unlawful monopolies. Here exist the resources of government for its war with unlawful monopoly. All of these things, by congressional intent and by past and present-day practice and reality, flow into this agency of government. In short, these are the professionals of government, whose solemn trust and obligation it is to protect the public from the effects of unlawful business practices.

By way of sharp contrast and keenly illustrative of the tragic—or perhaps ludicrous—result if the Department of Justice be shorn of its powers because of administrative intrusions is the total lack of competence, personnel, and skill within the Federal Power Commission to prosecute, to prove, and to judge violations of the monopoly laws. The Federal Power Commission, historically and now, is concerned with projects upon navigable waters and the development of the nation's water resources and, since 1938, with its duties under the Natural Gas Act and all of the problems

arising therefrom. Its administrative expertise exists in these two specialized fields. Its personnel is recruited and trained toward this end.

In contrast, the sharp picture of competence upon the part of one agency concerning the monopoly laws, as against the total incompetence of the other agency, is so compelling, so self-evident, as to require little discussion.

Unless the Commission is directed to apply itself to its own business, the possibility of similar action by this and other commissions is not unreal.

And then we come to some of the real difficulties if an agency, as here, can lawfully assume such functions.

Who is to present the antitrust case? Are the files of the Antitrust Division of the Department of Justice to be turned over to the agency; is Justice required or, indeed, permitted to intervene; is the role of protector of the public interest against unlawful monopoly to be assumed by an intervenor who, perchance, may be possessed of the competence to meet such a responsibility; is the intervenor to be furnished with the assistance and cooperation of the Antitrust Division of the Department of Justice and of the agency itself?

These questions and the many other questions they prompt could be recited endlessly. They serve to illustrate most clearly the host of problems associated with any unlawful assumption of power, as here.

II.

THE COMMISSION COULD NOT LAWFULLY OR CORRECTLY DETERMINE PUBLIC CONVENIENCE AND NECESSITY AFTER EXCLUDING FROM CONSIDERATION THE ISSUE OF ECONOMIC IMPACT OF APPLICANTS' PROPOSAL AND ITS EFFECT UPON RATES.

Certainly, the effect of a merger upon commodity prices to consumers is a relevant and material consideration to resolution of claimed violations of the antitrust acts. It is true, as well, that such considerations are equally pertinent to a determination of whether a proposed acquisition is required by the public convenience and necessity as that term is used in Section 7(e) of the Natural Gas Act. California contends that the Commission's refusal to permit specific inquiry as to the effect of the proposed merger upon El Paso's rate structures, and its refusal to consider this question at all, amounts to a denial of due process and an abdication of the Commission's responsibilities under the Natural Gas Act.

Applicants posed benefits in the form of anticipated lower rates. The Decision of the Presiding Examiner itself discusses the question of rates. The decision refers to "Lower Rates in Prospect"; it recites "that no new rate increases to Pacific's present customers would be filed with the Commission for at least one year from the date of the approval of the merger by the Commission." It discusses "Reasonable Anticipation of Lower Rates." Here the Examiner discusses those factors "which may bring about lower rates for the consumers in all markets on the merged system."

The Examiner's decision treats of "Future Rates." Here the Examiner, after previously discussing "Lower Rates in Prospect" and "A Reasonable Anticipation of Lower Rates," then states,

> " * * * [T]he merger herein authorized is to have no effect whatever upon any rate being paid by any cus-

> tomer of either El Paso or Pacific * * *. It must not be predicted here what the future rates will be * * *. *Therefore, all evidence relating to future rates to be charged on the unified system is irrelevant.* * * * *This is not a rate proceeding and will not be permitted to become such.*" (Italics supplied.)

The subject of rates was gone into by applicants in direct presentation. As a basic right upon the part of California to cross-examine, it was error to preclude inquiry into the impact of merger upon existing or future rates.

Consistent with its obligation to authorize the acquisition under Section 7(c) only if such "is or will be required by the present or future public convenience and necessity," the Commission was obliged to permit inquiry as to the impact upon rates, and as part of their burden of proof applicants were obliged to present such evidence.

1. PREVIOUS COMMISSION DECISIONS UPON RATES.

That the importance of rates looms large in certificate proceedings cannot be disputed. It is significant that in those certificate proceedings under Section 7 wherein projects of a major nature are proposed the Commission has taken evidence as to rates—*specific future rates.*[21] There has been a consistent administrative position in this regard, which can be taken to be the administrative construction of the requirements of proof under Section 7 of the Natural Gas Act.[22] From the first cases dealing with certificate applications under the Natural Gas Act to the present, the requirement for rate evidence has not changed. From *Kansas* to *CATCO* (see App. B) rates are indispensable in major certificate cases.

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21. Cases collected here in Appendix B.

22. Consistent administrative construction of a statute is entitled to great weight. *Harwick v. Comm'r.*, 320 U.S. 489 (1943).

2. STATUTORY HISTORY.

The statutory history of Section 7 of the Natural Gas Act leads to the conclusion that in order to adjudge whether a project either by way of construction, extension or acquisition is in the public interest, considerations of impact upon rates must be inquired into. As originally enacted on June 21, 1938, by Public Law 688, 75th Cong., Chapter 556, Third Session (H.R. 6586), 52 Stat. 825, 15 U.S.C. § 717f, Sec. 7(c) provided that certificates of public convenience and necessity for construction, extension or acquisition should be given after due consideration to applicants' ability:

> "* * * to render and maintain adequate service at rates lower than those prevailing in the territory to be served * * *."

Here specifically rate evidence was required in order that the Commission could adjudge and compare it to existing rates prevailing in the territory to be served.

Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, Second Session (H.R. 5249), 56 Stat. 83, 15 U.S.C. § 717f. The present provisions of Section 7(c) were adopted in 1942. The intention of Congress was to strengthen and to make more effective the Commission's regulation of natural gas companies and their rates. Under Section 7(c) as originally enacted the power of the Commission to control initiation of service was limited to situations in which a company sought to enter a market already being served by another natural gas company. Section 7(c) was changed so as to require all persons to obtain certificates of public convenience and necessity authorizing them to engage in jurisdictional services or to construct, extend or acquire facilities, the use of which would make them natural gas companies.

The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms (H. Rept. No. 1290, 77th Cong., 1st Sess., pages 2-3):

> "* * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of gas reserves, the feasibility and adequacy of the proposed services, *and characteristics of the rate structure* in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. * * *" (Italics supplied.)

And the Senate Committee on Interstate Commerce made a similar explanation (S. Rept. No. 948, 77th Cong., 2d Sess., pages 1-2):

> "Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to 'a market in which natural gas is already being served by another natural-gas company'. Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. *The characteristics of their rate structure could be studied.* * * *" (Italics supplied.)

It is significant that in the report of the Committee of the House and of the Committee of the Senate both refer to the opportunity of the Commission to examine "characteristics of their rate structure."

3. THE NATURAL GAS ACT AND THE REGULATIONS UNDER THE NATURAL GAS ACT.

Section 7(d) of the Natural Gas Act provides that applications for certificate:

> "shall be in such form, contain such information • • • and in such manner as the Commission shall by regulation require." (56 Stat. 84 (1942); 15 U.S.C. 717f(d)).

Rule 157.16 of Regulations under the Natural Gas Act provides as follows:

> "157.16 *Exhibits relating to acquisitions.*
>
> In addition to complying with the applicable requirements of § 157.14, every application involving acquisition of facilities shall be accompanied by the following exhibits:
>
> (a) *Exhibit Q—Effect of acquisition on existing contracts and tariffs.* A statement showing the effect of the proposed transaction upon any agreements for the purchase, sale, or interchange of natural gas, and upon any rate schedules of tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission." (18 C.F.R. 157.16)[23]

4. THE THEORY UNDERLYING THE REQUIREMENT OF DATA AS TO IMPACT UPON RATES.

The purpose of the Natural Gas Act has been stated many times from *Hope*[24] to *Phillips*[25] to *CATCO*.[26] The Supreme

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23. While the Commission and applicants before it must conform to the regulations of the Commission. (*Public Service Commission of the State of New York v. Federal Power Commission et al*, CADC No. 15366 (CADC, 1961)), at no time did applicants herein furnish any showing as to the specific effect of the proposed transaction upon existing agreements, rate schedules, or tariffs on file with the Commission.

24. Federal Power Com. v. Hope Nat. Gas Co., 320 U.S. 591 (1944).

25. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

26. Atlantic Ref. Co. v. Pub. Serv. Com. of New York, 360 U.S. 378 (1959).

Court has consistently held that it was enacted to prevent exploitation of the consumer and to assure unto him just and reasonable rates. A merger of such economic consequences is something which can be measured only in terms of cost to the consumer or at least cost and rate impact cannot be ignored in passing upon it. That merger is to have an effect upon rates is inevitable, as the testimony of the witnesses Roberts and Simonds disclosed. The witness Simonds, utilizing the recognized Commission methods of distributing costs upon the merged system, posed a total revenue deficiency for the merged system of $60,214,570 in 1960 and $34,659,265 in 1962. This revenue deficiency must realistically be recognized as having an effect upon existing rates. The Commission is under a statutory duty at all times to authorize and to maintain rates which are "just and reasonable" and no other. It hardly seems consistent with any sensible construction of the Natural Gas Act to permit applicants, as here, to avoid the consequences of the requirements of the regulations upon the bland statement that merger will have no effect upon existing rate schedules or tariffs.

The necessity for scrutinizing the great consequences of this merger as to rates becomes mandatory in view of the administrative delay attendant upon Section 4 proceedings. The Natural Gas Act permits the imposition and collection of new rates and charges by the mere device of filing such. Administrative resolution made many years after the initial filing is highly unsatisfactory. Rate payers come and go, and refunds, while theoretically satisfactory, are in practice otherwise.

California strongly asserts that under the reasoning of *CATCO*, when viewed in light of the practical operative effect of the rate making procedure under the Natural Gas

Act, the failure to require evidence and proof as to the impact of this merger upon rates is error.

It has been shown that the dollar impact upon a natural gas company's rate structures is an element indispensable to consideration of a proposed acquisition of facilities under Section 7 of the Natural Gas Act. Such consideration was clearly required of the Commission by Congress, as the legislative history of the statute indicates. This Court has recognized the importance of this consideration. The Commission itself has promulgated rules requiring specific evidence addressed to this consideration, and has consistently interpreted the statute to include consideration of economic impact upon rate structures. For the Commission to forego consideration of this issue was to abdicate its responsibility. The failure of the Commission to consider the specific effect of the merger upon rate structures, especially in view of the antitrust questions presented in this case, was arbitrary action and a clear failure to exercise its jurisdiction.

It was error for the Commission to permit applicant to avoid the requirements of Section 157.16. It was error for the Commission to deny California examination upon so vital a subject. It was error for the Commission to disregard its requirements as established in all of the agency decisions here cited.

5. THE NECESSITY FOR CONSIDERATION OF COST DEFICIENCIES AND RATES.

In *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 78, 3 L. ed. 2d 1312, decided June 22, 1959 *(CATCO)*, the United States Supreme Court was concerned with Commission failure to impose a price condition, because of the long delays attendant upon investigations into rates instituted under Section 5 of the Natural Gas

Act. In the words of the court, "* * * The inordinate delay presently existing in the processing of Section 5 proceedings requires most careful scrutiny and responsible reaction to initial price proposals of producers under Section 7."

The rationale of *CATCO*, coming from concern as to delay in proceedings before the Commission, is applicable to this case.

The assurance of the Commission that no possible detriment can occur because of merger on account of the rate fixing procedure set forth in Section 4 of the Natural Gas Act is simply not true. The experience of California with Section 4 proceedings best illustrates that of which California here complains, and best illustrates the absolute necessity of determining before merger the impact of such upon rates:

Docket G-4769[27]

October 14, 1954	El Paso files for increased rates.
November 15, 1954	Rates suspended by Commission order.
April 15, 1955	Rates permitted to go into effect.
July 11, 1956	Hearings commenced.
December 12, 1956	Hearings concluded.
March 20, 1958	Presiding Examiner's decision.
July 8-9, 1958	Oral argument.
August 10, 1959	Commission Opinion and Order (Opinion No. 326).
September 8, 1959	Application for Rehearing.
October 8, 1959	Order Denying Application for Rehearing.
Increase requested	$18,841,000.

Almost five years from filing to decision!

Docket No.	Effective Date	Amount of Increase Being Collected
G-12948	January 1, 1958	$19,550,000
G-17929	August 1, 1959	27,231,000
RP60-3	On or about August 24, 1960	22,085,625

27. These matters were finally set for hearing commencing in July 1961.

The public convenience and necessity cannot be divorced from questions of rates and charges. Any meaningful and, consequently, protective standard of public convenience and necessity must take into account the impact of so momentous a merger upon rates and charges being paid by existing customers. If the Commission may authorize a merger of such great moment while omitting inquiry as to costs and rates and charges and deferring them to a future providence, the public convenience and necessity can never be precisely measured until a later inquiry into rates and charges, at which time such inquiry, while informative, is meaningless to the basic and irrevocable decision in a certificate proceeding. The Commission should be here directed to conduct new proceedings, consistent with an interpretation of the phrase "public convenience and necessity" which will insure to the consumers the protection Congress intended to accord them.

6. THE MERGER BENEFITS THE STOCKHOLDERS AND NOT THE PUBLIC.

The general stock acquisition offer of El Paso served to "bail out" the stockholders of Pacific. This weakened El Paso, with no offsetting benefits to El Paso. Merger resulted in but negligible benefits to the consumers of Pacific. Such consumers were being furnished natural gas by Pacific, and there was not the remotest possibility that such would be discontinued. Under the Natural Gas Act (Section 7 (b)) no abandonment is permitted without Commission approval that such abandonment suits the "present or future public convenience and necessity."

See, also, *Sunray Mid-Continent Oil Co. v. Federal Power Commission* (1960), 364 U.S. 137.

III.

THE COMMISSION THROUGHOUT THE PROCEEDINGS CONSISTENTLY DEPRIVED CALIFORNIA OF DUE PROCESS.

1. FAILURE TO CONSIDER RELEVANT EVIDENCE.

It has been stated herein that the Presiding Examiner in another proceeding entitled "*In the Matter of Panhandle Eastern Pipeline Company*," Federal Power Commission Docket No. G-19780, in the hearing held at Washington, D. C., on March 14, 1960, said, with reference to the merger case:

> "I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.
>
> "Now, that is what I am talking about, all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are." (Tr. 584-585, Docket No. G-19780.)

The order of the Commission adopts the decision of the Presiding Examiner and carries with it whatever exists by way of error. This deficiency upon the part of the Examiner is particularly significant in view of the fact that a period of but thirteen days elapsed from the date of the oral argument to the date of the final decision. While we are familiar with the presumption that official duty has been regularly performed, nonetheless it is our position that the presumption has been met and defeated by the gratuitous statement of the Examiner in the Panhandle Eastern Pipeline Company proceedings.

The law is quite clear that the parties to the proceedings are entitled to due process and to a full and fair hearing:

In *Morgan v. U.S.*, 298 U.S. 468, the Court said at page 481:

> "• • • [T]he weight ascribed by the law to the findings • • • rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

The 500 pieces of evidentiary matter received because admissible were before the Examiner. Their admissibility obviously rested upon the proposition that they were relevant, competent, and material, which is but another way of saying that all of them were significant to the case and to its outcome. They were not to be ignored, or passed over lightly, because of expediency or because, in the judgment of the Examiner, they posed "unnecessary work."

As stated in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U.S. 292 at 305, with reference to an administrative proceeding and the requirement of the rudiments of absolute fair play, "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected • • •."

The basis for the decision in this case is that of the Presiding Examiner. The Commission itself stated, "We are approving the merger and adopting the Presiding Examiner's decision." At page 4 of the Order of the Commission, we find: "We shall adopt the reasoning of the Presiding Examiner as set forth in his decision • • •." The evidence before the Examiner became crucial inasmuch as it was his reasoning, based upon the record and his consideration of

the record, upon which the Commission reached its final order.

While the realities of the administrative burden may mitigate the duty of a Commission to hear or to read literally every portion of the proceedings before it, nonetheless even administrative expediency cannot dispense with some basic requirements of due process. It cannot be said that expediency could excuse want of notice or the requirement of a hearing. It *can* be said that at some point in the process either the agency or a designated officer must hear and examine the case before it. Failure to comply with this simple requirement results in unfairness to the parties and a lack of due process.

The Significance of the Omission upon the Part of the Examiner to Consider the Evidentiary Material Presented to Him.

One of the key exhibits received in evidence by the Examiner was that of the witness Roberts, testifying on behalf of the intervenor Pacific Gas and Electric Company.

Roberts' Exhibit 423 (R. 1039-1048), prepared from data introduced by El Paso, showed cost both before and after the proposed merger. It followed the same methods of allocation utilized by El Paso; that is, a system-wide basis of allocating production cost and a zone basis for allocating transmission and storage cost. Production costs include all of El Paso's costs in exploring, developing, and producing from its own wells, as well as the cost of purchased gas.

Roberts' exhibit also showed the effect of using the system-wide method of allocating transmission costs. For the year 1960, using the method employed by El Paso in its presentation, the exhibit shows that the cost allocated to P.G.&E. would be increased by $1,907,576 as a result of the merger. If the system-wide method of allocation were used by the Commission, this increase would total $7,206,506.

Similarly, the costs allocated to P.G.&E. for the year 1962 would be increased by $2,664,670, following the zone method, and $4,520,043 if the system-wide method were utilized.

This exhibit was indispensable to any lawful or complete decision as to merger in this case. As the record now stands, there is nothing indicating that consideration was given to it or that it was or was not one of the 15 or 25 documents examined carefully—or examined at all—by the Presiding Examiner. Petitioner asserts that it has been denied the full, fair hearing contemplated by law and that the proceedings were lacking in due process and for that reason the order founded thereon is void.

With reference to increased costs after merger, a key exhibit was that prepared by Simonds, a public utilities specialist in the Bureau of Rates and Gas Certificates of the Federal Power Commission. Simonds prepared Exhibits 420 (R. 1031-1032) and 421 (R. 1033-1034), which, based upon El Paso's claimed costs, likewise showed the increased cost to existing El Paso customers if merger were to result. This doubt as to the precise exhibits examined or not examined carefully cannot be pinpointed, nor can the precise exhibits not examined be stated. Nonetheless, it can with certainty be stated that only 15 or 25 of the exhibits were examined carefully, or examined at all. We could here recite endlessly all of the exhibits received in evidence, all of which had a bearing on the case, some obviously of greater significance than others, and many of which could be termed crucial to any full and fair consideration of the case.

In short, failure to examine certain exhibits would result in erroneous judgment.

California urges that the Commission's failure to consider admittedly relevant evidence is a denial of the hearing re-

quired by the Natural Gas Act, and a denial of administrative due process in contravention of the Fifth Amendment,[28] for in this case, the Examiner's decision was that of the agency. The Examiner's failure to consider the whole record in this case is also the agency's failure. During the course of these proceedings various members of the Commission were under ex parte pressure to render this decision expeditiously (R. 1375). That this case was quickly decided by the Commission is a matter of record. The Examiner's decision was issued on November 20, 1959. Oral argument was heard by the Commission on December 10 following, and thirteen days thereafter, on December 23, its final order was issued. Moreover, the Commission admittedly adopted its Examiner's report as its own. The Commission decision is a virtual precis of the Examiner's report. By no stretch of the imagination may it be assumed that the Commission gave this case any more consideration than did its Examiner. The Commission has leaned heavily upon a very frail reed.

We are aware of the need to protect administrative integrity, but we insist that even in the institutionalized administrative process of decision, someone, somewhere along the line must address himself to *all* of the relevant evidence. There is much more than a mere shadow of doubt that this has been done in this case. Accordingly, remedial action is necessary.

2. WHOLESALE ADMISSION OF IRRELEVANT EVIDENCE IS A DENIAL OF ADMINISTRATIVE DUE PROCESS.

Examiner Kelly's remarks about his treatment of the evidence of record in this case may be construed as the protest of a conscientious man against the overburdening of the

28. *Lloyd Sabaudo, S.A. v. Elting*, 287 U.S. 329, 338-339 (1932).

record by counsel out of an abundance of caution. This is the way the court below construed it.

It must be remembered, however, that Examiner Kelly not only wrote the Commission's initial decision, but that he also presided over the reception of evidence. Each of the 500 documents he complains of were received in evidence by him. Presumably he considered them relevant. He could have excluded them as being cumulative, collateral to the main line of inquiry, as an unnecessary burden to the record. He did not do so. Yet he indicates that out of the 500 documents he received he considered only 15 or 25 to be material and relevant.

Where does this information leave litigants before the Federal Power Commission? Presumably the practice of counsel in introducing "kitchen-sink" applications will continue, for the Commission has not indicated just which 1/20th of the evidence it considers relevant. Yet the fact remains that 19/20ths of such evidence shall probably receive but scant consideration. If this is annoyingly expensive to applicants, it is disastrous to protestants and intervenors. How are we to know, out of the great mass of information which an applicant will introduce at a Commission hearing, which points to rebut? We are put in the position of playing a guessing game, of playing "blindman's buff."

We think it is not too much to ask that we be entitled to know the precise contentions of our adversaries which the Commission will consider determinative.[29]

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29. *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 301 U.S. 292 (1937); *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88 (1913); and see Opinion of Warren, C. J., dissenting, in *Gonzales v. United States*, 364 U.S. 59, at 73 (1960): "In requiring a hearing, Congress did not mean, in my opinion, that a guessing contest would suffice * * * I doubt that anyone would maintain that there

3. TAKING OFFICIAL NOTICE OF OTHER PROJECTS DEPRIVED CALIFORNIA OF DUE PROCESS.

In disposing of the antitrust problem, the Commission made reference to the certificate issued to Transwestern Pipeline Company and to the application of Pacific Gas Transmission Company. The decision erroneously took official notice of each of the other proceedings; further, and erroneously, it took official notice that each of the other proceedings was competitive in nature, so as to cure any violation of the Clayton Act.

The error committed herein can be chronologically set forth as follows:

Merger Application: The instant case commenced with an application filed on August 7, 1957; the hearing opened on September 17, 1958, and concluded on January 6, 1959. No further testimony or evidence was received, nor could it have been without reopening after January 6, 1959.

Transwestern Application: The application was filed on April 15, 1958; hearings opened on December 15, 1958; fifteen days of hearing were had, in addition to others, from March 10 to April 2, 1959, at which time the matter was finally submitted; the decision was rendered on August 10, 1959.

Pacific Gas Transmission: The application was filed on December 29, 1958; hearings commenced on October 15, 1959, and have concluded; at the time of the merger hearings the matter was still pending.

We question whether it was proper in the first instance for the Commission to take official notice in the detail it did

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would be a hearing in any true sense of the word if such a person were told by the Department that he could appear and say whatever he wished, but that the Department would not indicate to him what it considered pertinent—indeed, what it considered conclusive unless rebutted • • • ."

of two unrelated proceedings. Even assuming the Commission could take official notice of the applications in the other cases, it could not, from the applications or from anything else, lawfully take official notice that these other projects were competitive.

As the chronological narration set forth shows, the Transwestern case had fifteen days of hearings from March 10 to April 2, 1959, long after the merger hearings had concluded on January 6, 1959.

The Pacific Gas Transmission case and hearings therein did not commence until October, 1959, approximately nine months after the hearings had concluded in the merger case.

While reference was made in a most casual fashion to Transwestern and Pacific Gas Transmission in the merger case, no evidence whatsoever was offered upon the proposition that either or both would furnish such competition as would dispose of Section 7 of the Clayton Act.

It was error for the Commission to find as it did concerning the antitrust problem; the Commission denied California due process and committed error under the Administrative Procedure Act (60 Stat. 237 (1946), 5 U.S.C. § 1001, et seq. (1946)). Section 7(d) of the Administrative Procedure Act states as follows: "• • • Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary" (60 Stat. 240; 5 U.S.C. § 1005(d)).

See, *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *Railroad Commission of California v. Pacific Gas & Electric Company*, 302 U.S. 388 (1938); *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63 (1935).

4. THE DECISION WAS DEFICIENT AS TO FINDINGS AND EVIDENCE TO SUPPORT THE FINDINGS.

The Decision of the Examiner and the Order of the Commission contain broad ultimate findings—or generalities, as they are better described. The Commission's Opinion is replete with references to "benefits," "the public interest," "distinct benefits," "lower rates," "reasonable anticipation of lower rates," "future rates."

The Commission Decision and Order is deficient as to basic findings.

The necessity for findings upon basic and ultimate issues has been discussed in *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 631, 634 (1945):

> "Here as in the cases of Canadian and Colorado Interstate the findings of the Commission leave much to be desired. The findings are general and incorporate by reference the staff exhibits, on which reliance is put for the subsidiary findings. • • •
>
> "The review which Congress has provided for these rate orders is limited. Section 19(b) 15 USCA Sec. 717r(b), 4 FCA title 15, Sec. 717r(b) says that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. Florida v. United States, 282 US 194, 215, 75 L ed 291, 304, 51 S Ct 119; United States v. Baltimore & O. R. Co., 293 US 454, 464, 79 L ed 587, 594, 55 S Ct 268; United States v. Chicago, M. St. P. & P. R. Co., 294 US 499, 504, 505, 510, 511, 79 L ed 1023, 1028, 1029, 1031, 1032, 55 S Ct 462; United States v. Carolina Freight Carriers Corp., 315 US 475, 488, 489, 86 L ed 971, 982, 62 S Ct 722. Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress

> has provided the standards for judicial review under this Act. Sec 19(b). The courts cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under Sec. 19(b) to make findings and substitute them for those of the Commission."

The decision omitted any basic finding permissible from the evidence before it as to the impact of the deficiency of the Pacific system upon the merged system or its impact upon rates. The decision omitted any basic finding as to specific benefits to the customers of the merged system.

The Commission failed to make any specific findings as to whether or not the two corporations could continue to operate separately. The Commission failed to make any specific findings as to "distinct benefits" to the public attainable by the two corporations dealing separately with each other.

The Commission failed to make any specific findings as to how or in what manner Transwestern or Pacific Gas Transmission Company would be competitive with El Paso. The Commission failed to make any specific findings that possible future competition by Transwestern or Pacific Gas Transmission Company would be of such nature as to defeat any alleged antitrust violation.

The Commission failed to make any specific finding that additional Canadian gas was, in fact, available without merger. The Commission failed to make any specific finding that without merger Pacific could not improve its financial position. The Commission failed to make any specific finding or to consider the future operation of Pacific as a subsidiary of El Paso.

Typical of the rather cavalier treatment by the Examiner of the deficiencies in the testimony before him is his discussion of "Savings in Operating Expenses." As the Examiner

describes it, the prediction of savings was but "a rough estimate of the savings." While recognizing attacks upon the accuracy of the estimates, the Examiner dismisses them in this manner:

> "No attempt is made here to determine the accuracy of these estimates. The evidence shows clearly that substantial savings in the costs of operation may be effected by the joint operation of the two systems. No finding is here made of any exact dollar amounts expected to be so saved and no such finding is important to the decision here upon the basic issue of whether the merger is in the public interest. Any savings in cost of operation are in the public interest." (R. 1224)

This evasive, circular reasoning, this disregard for any consideration of specifics as to prices, costs, or dollar savings, is typical of Commission treatment in this case. The Examiner here plainly concedes that savings are but a guess and that attacks upon them are not to be permitted, since savings apparently are the subject of guesswork, at best. From the guesswork, however, or the rough estimate, the Examiner finds that "substantial savings" will occur.

California is entitled to specific findings. Estimates, guesswork, unsupported predictions, matters stated but unproven, are not a sufficient basis for authorizing a merger of this consequence.

The same remarks have been directed toward the Commission's treatment of rates, wherein they presume lower rates, reject all efforts to test such contentions, and seek to cure whatever deficiencies inhere in the record by broad ultimate findings which, in effect, tell us, "All is well. Your present difficulties can be litigated in the future, after the merger is fastened upon you."

In *Central New York Power Corporation*, 5 F.P.C. 194, 65 P.U.R. (N.S.) 510, proceeding from a higher standard,

the Commission had before it "a very rough estimate • • • made a couple of years before the recent steel strike was settled and the prices of steel advanced," which rough estimate was of the cost of facilities proposed to be constructed. As the decision states, "The experience or basis upon which the original 'very rough estimate' and the revised 'guess' was made is not disclosed by the record." The Commission disposed of such testimony and evidence in this manner: "Upon the evidence of record we are unable to find that it [Central] has met the burden of proof. We will, therefore, dismiss the application without prejudice."

California submits that the decision is in error for want of basic findings upon important issues which were before the Commission.

IV.

THE COMMISSION FAILED TO GRANT CALIFORNIA A FAIR HEARING IN PERMITTING REPRESENTATIVES OF THE APPLICANTS TO MAKE FREQUENT EX PARTE APPROACHES TO ITS MEMBERS DURING THE COURSE OF THE HEARINGS.

Section 7 of the Natural Gas Act imposes upon the Commission a positive duty to conduct hearings upon applications thereunder. Where an administrative agency has been required to take action only after hearing, it is by law required to conduct a fair hearing (See e.g. *Simmons v. United States*, 348 U.S. 397 [1955]). Consistently with this requirement, the Commission has promulgated an elaborate scheme of procedural rules designed to insure the fairness of its proceedings (See 18 C.F.R., Part I, Rules of Practice and Procedure).

A. Standards of Conduct Established by the Commission.

The Federal Power Commission has adopted a rule of procedure applicable to practitioners before it which imposes upon such practitioners, lay or professional, the same standards of conduct required of lawyers. The Commission's Rule 1.4(a)(3) provides:

> "All persons appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States * * *."

It is an elementary principle of legal ethics that attempts to exert personal influence upon a court fall short of the moral standards expected of lawyers. Indeed, even conduct which gives merely the appearance of such impropriety is frowned upon. Canon 3, of the Canons of Professional Ethics of the American Bar Association, provides that:

"Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstruction of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor * * *."

B. The Failure of the Commission to Enforce Its Adopted Standard of Conduct.

Subsequent to the hearings before the Commission in this case, hearings had before a special House subcommittee revealed to petitioner that frequent ex parte contacts had been made with members of the Commission by representatives of the applicants.

One of the issues formulated in oral argument before the full Commission was El Paso's desire for an expedited decision in this case, and California's opposition thereto. (See pp. 21-22, *supra*). The testimony adduced before the subcommittee indicates many telephone calls and visits were made to individual Commissioners in which "usually a matter of expediting, getting cases going" were mentioned (R. 1417).

The record also indicates many social contacts, and occasions where the merits of pending cases may have been discussed. (R. 1421). As to most of these meetings, no recollection remained as to the conversations which occurred (R. 1420-1422).

There is nothing in the record to indicate that the Commission ever took any steps to discourage these contacts, or to keep them within bounds, except for some testimony that occasionally visitors had to be reminded of the necessity to avoid discussion of pending cases (R. 1380). Very

sketchy records were made as to the frequency of these visits (R. 1398-1399), and no records were maintained as to the content of the conversations or the nature of the presentations made.

C. The Need for Remedial Action.

There are several reasons why it must be insisted that the Commission take affirmative action to enforce its own standards of ethical conduct required of practitioners before it.

The first and most compelling reason is to protect the integrity and respectability of the administrative process. Conduct such as is described in the record cannot but arouse suspicion in the mind of the community as to the motives of ex parte advocates. However much this suspicion may be ill-deserved, however innocent the actual content of the suspected conversations, such conduct inevitably results in loss of public trust and confidence in the instrumentalities of government. Effective government cannot exist in the absence of public trust and confidence. This principle was very recently recognized by this Court in its construction of the conflict of interest statutes, where it was said that conduct having the same effect as the conduct described in this record

> "endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those that govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." (*United States v. Miss. Valley Generating Co.* (1961), ... U.S. ....., 5 L. ed. 2d 268, 295.)

This same principle is openly espoused and advocated by the President of the United States, who said in a Special

Message to Congress entitled "Ethical Conduct in the Government",

> "No responsibility of Government is more fundamental than the responsibility of maintaining the highest standards of ethical conduct by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality, and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective Government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter." (107 Cong. R. 6454, H. Doc. No. 145.)

A further reason for the Commission to take affirmative action is the requirement of the Natural Gas Act that it issue certificates only after a hearing. It is an indisputable element of due process that hearings should be had only upon a public record. The reason for this requirement is that all litigants should be apprised of the nature of the contentions made by their adversaries.[30] Where the Commission accepts *ex parte* presentations and fails to notify adverse litigants of such presentations, the adverse litigant is deprived of that notice and opportunity to be heard in rebuttal which due process requires.

Furthermore, a litigant before the Commission has the right to expect that the Commission will enforce and abide by its own rules of general application.[31] For it to fail to do so is for it to take arbitrary and capricious action, and

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30. *Ohio Bell Tel. Co. v. P.U.C.* (1937), 301 U.S. 292, 302-305.

31. *United States v. Shaughnessy*, 347 U.S. 260, 264-265 (1953); *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1949); See also *Public Service Comm. of the State of New York v. Federal Power Commission, et al.*, CADC No. 15366, decided June 15, 1961.

negatively to act in excess of its jurisdiction. For the Commission to institute rules which its does not enforce is for it to inspire contempt of such rules and of the Commission itself.

It is not only the effect upon the public which must be considered where conduct such as this is involved. The pattern of informal, off-the-record approaches to individual commissioners by paid public relations specialists, sometimes former commissioners, must inevitably, over the years, affect, subconsciously perhaps, the thinking and philosophy of the Commission. It must be remembered that the Commission, unlike a court, is required, because of the nature of the natural gas pipeline industry, to deal with the same small group of litigants on a day-to-day basis. Because the pattern of regulation established by the Natural Gas Act requires frequent Commission action in the regulation and supervision of the industry, the corporations affected have found it expedient to establish Washington-based representatives who are in constant attendance upon the Commission. On the other hand, consumer interests do not have the resources for such specialized representation. This situation has been of some concern to Congress.

> "Much attention has recently been centered on efforts, unfortunately too frequently successful, to sway the judgment of the members of regulatory agencies by so-called *ex parte* approaches or arguments, usually personalized, made off the record in proceedings that should be decided on the record. The extent of the *ex parte* approaches has only partially been revealed. They come from various sources—the office of the President, members of the Congress, and the regulated industries. Some are made in good faith; others to further a personal desire regardless of the public interest. Many of them emanate from lawyers striving to press their clients' cause, indeed, one of the worst phases of

this situation is the existence of groups of lawyers, concentrated in Washington itself, who implicitly hold out to clients that they have means of access to various regulatory agencies off the record that are more important than those that can be made on the record. These lawyers have generally previously held positions of more or less importance in the Government. The examination of the appointment diary of one of the present Commissioners gives strong inferential although not definitive proof of what these off-the-record approaches can imply.

"Instances have also recently been uncovered of actual malfeasance in the sense of bribery among high administrative officials. More serious than these are the subtle but pervasive methods pursued by regulated industries to influence regulatory agencies by social favors, promises of later employment in the industry itself, and other similar means." (Report on Regulatory Agencies to the President-Elect, Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, 86th Cong., 2d Sess., December 1960.)

THE PREDICAMENT OF CALIFORNIA AS AN INTERVENOR.

California is confronted with legitimate bases for doubt and suspicion. Conduct such as here revealed, if encountered in a judicial setting, would compel quick and protective action upon counsel's part in the interests of a client's cause.

This Court should appreciate the great difficulty which stands before an intervenor in an administrative proceeding when met with evidence of conduct seemingly improper. A state or other intervenor has no power of process over a federal officer or a federal agency. Federal sovereignty effectively blocks any inquiry which might quell dissatisfaction and suspicion.

Realistically, even if such conduct be revealed while proceedings are still pending before an agency, an intervenor feels less than complete satisfaction if the only remedy available is to prompt an agency to investigate its own conduct. Self-investigation and judgment of one's own actions leave much to be desired. In short, since we are here dealing with a grave question of public morality and public policy, the quickest and most effective way to discourage such practices is to condemn them, as contrary to the best standards of public morality.

Government rests upon ideals. Such age-old words as truth and honesty, right and wrong, fair play and due process are barely descriptive of all that government stands for. The ideals of government have been oft expressed, and they are generally understood. There is a basic, permanent morality of government which is transgressed and violated but which does not change, regardless of the encroachments upon it.

The corruption of ideals takes many forms but basically, despite the variations of misconduct, they are always committed upon one broad ideal. So it is here, and so it is that past language of this Court, directed toward other peculiar forms of misconduct, is nonetheless quite relevant to these proceedings.

In *Trist v. Child* (1874), 21 Wall. 441, in condemning a contract for certain "lobby services," the Court stated, at page 450:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. [1 Montesquieu, Spirit of Laws, 17.] The theory of our government is, that all public stations are trusts, and that those clothed with

them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments."

The approaches developed before the congressional committee, while different in kind and coming from contemporary motives, nonetheless served to detract from the complete duty, dissuaded by other considerations, which the Commissioners owed to their public responsibilities.

See, also: *Sage v. Hampe* (1914), 235 U.S. 99; *Tool Company v. Norris*, (1864), 2 Wall. 45, at 55.

Conclusion

The issues posed by these proceedings are of major significance. This case presents for resolution the current controversy as to the enforcement of the monopoly laws between administrative agencies and the federal judiciary. It presents the first merger decision of consequence under the Natural Gas Act. It brings into question the dubious standard of public convenience and necessity approved by the Federal Power Commission. It presents to the Court an issue of morality and submits for re-affirmation the ideal of good conduct and fair play.

By way of relief, California requests

1. That the lack of jurisdiction in the Federal Power Commission to adjudicate antitrust questions be stated.

2. That the order approving the instant merger be directed to be set aside as deficient in proof of public convenience and necessity.

3. That the order of the Commission be set aside and the proceedings reopened, because of lack of due process in the proceedings of the Commission.

4. Such other relief as to this Court may seem meet and proper.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

Natural Gas Act, Act of June 21, 1938, 52 Stat. 825, as amended February 7, 1942, 56 Stat. 83, and July 25, 1947, 61 Stat. 459; 15 U.S.C. §§ 717f(c) and 717f(e).

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be

decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Clayton Act, Act of October 15, 1914, c. 323, § 7; 38 Stat. 731; as amended December 29, 1950, c. 1184, 64 Stat. 1125-1126; 15 U.S.C. § 18.

Acquisition by One Corporation of Stock of Another.

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Natural Gas Act, Act of June 21, 1938, § 4; 52 Stat. 822; 15 U.S.C. § 717c.

Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

* * * * * * *

(d) Unless the Commision otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge,

classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: * * * If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Rules of Practice and Procedure of the Federal Power Commission (1958), § 1.4(a)(3); 18 C.F.R. § 1.4(a)(3).

All persons appearing before the Commission or the presiding officer must conform to the standards of ethical

conduct required of practitioners before the Courts of the United States. * * *

Rules of Practice and Procedure of the Federal Power Commission (1988), § 1.26(5)(d); 18 C.F.R. § 1.26(5)(d).

(d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *Provided*, That any party shall, on timely request, be afforded an opportunity to show the contrary.

Rules of Practice and Procedure of the Federal Power Commission (1958), § 157.16; 18 C.F.R. § 157.16

SECTION 157.16. Exhibits relating to acquisitions.

In addition to complying with the applicable requirements of §157.14, every application involving acquisition of facilities shall be accompanied by the following exhibits:

(a) *Exhibit Q—Effect of acquisition on existing contracts and tariffs.* A statement showing the effect of the proposed transaction upon any agreements for the purchase, sale, or interchange of natural gas, and upon any rate schedules or tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission.

APPENDIX B

1939 In Kansas Pipeline and Gas Company and North Dakota Consumers Gas Company, 2 F.P.C. 29 (1939):

The opinion, at page 54, discusses "Proposed Rates and Revenues"—Section 7, Natural Gas Act (N.G.A.)—here the Commission rejected the application because of lack of a showing "with regard to the rates proposed to be charged," which resulted in "the present inadequate state of the record upon this matter" (55).

1944 In the Matters of Hope Natural Gas Company, et al. 4 F.P.C. 59 (1944):

Section 7, N.G.A.—at pages 64 and 65 are set forth specific volumes of gas, with specific prices per M.c.f. therefor.

1944 In the Matters of Hope Natural Gas Company, et al. 4 F.P.C. 161:

Section 7, N.G.A.—at page 163 is the subject heading "Additional Evidence as to Proposed Rates." At page 165 is found:

> "Upon the entire record, we find that the public convenience and necessity require the construction, operation and acquisition of the facilities * * *."

Part of the entire record upon which the ultimate finding was made included a showing as to specific rates, to wit, a proposed rate of "35 cents per M.c.f. downward to 33½ cents." (Id. at 163)

1945 In the Matters of El Paso Natural Gas Company, et al. 5 F.P.C. 115, 64 P.U.R. (N.S.) 182:

Section 7, N.G.A.—El Paso's application to construct a pipeline from Texas to California. At page 125 is this:

"El Paso's Interstate Wholesale Rate—El Paso proposes to charge the California companies the following average rates * * * 15.08 cents per M.c.f. during the first year * * * 14.52 cents per M.c.f. during the second, third and fourth years * * * 13.92 cents per M.c.f. in the fifth and succeeding years * * *."

The Commission acted, "upon consideration of the record in this case" and upon finding that "applicants have met the requirements for a certificate of public convenience and necessity, and that the proposed construction, operation, service, and sale are required by the present and future public convenience and necessity." (Id. at 126)

1947 In the Matter of Michigan-Wisconsin Pipeline Company, 6 F.P.C. 1, 67 P.U.R. (N.S.) 427:

Section 7, N.G.A.—at page 19 is the subject "Rates." The opinion states: "A block type of rate structure * * * is proposed as follows * * *." Specific rates are stated. "Applicant urges that this form of rate will give the consumer the full benefit of the storage features of its project." The Commission required further study of the proposed rates "to determine whether the proposed rates * * * will assure the lowest reasonable ultimate consumer charges * * *." (Id. at p. 20)

1948 In the Matter of Trans-Continental Gas Pipeline Company, 7 F.P.C. 24:

Section 7, N.G.A.—at page 38 of the decision is the subject heading "Tariff Proposals." The decision states:

"During these proceedings the Applicant through its president submitted in evidence a tariff * * * containing proposed rates, charges and service provisions for the sale of gas to distributors for resale. This tariff contained a demand-commodity rate * * *."

The Commission found "Applicant's proposed tariff and contemplated operations * * * are not in the public interest * * *." (Id. at 39)

1949 In the Matter of Trunkline Gas Supply Co., 8 F.P.C. 250:

Section 7, N.G.A.—at page 257 appears "Tariff and Rate Proposals" and the opinion notes:

"During the course of the proceedings Trunkline submitted * * * a proposed tariff containing a rate schedule * * *."

1950 In the Matter of Texas Illinois Natural Gas Pipeline Co., 9 F.P.C. 105:

Section 7, N.G.A.—at page 115 appears "Tariffs and rate proposals." The opinion contains a complete discussion in detail of demand and commodity charges, with specific prices per M.c.f. The certificate was granted because "The record shows and we find that natural gas service to these communities will be in the public interest * * *." (p. 121)

1950 In the Matter of San Juan Pipeline Co., et al. 9 F.P.C. 170, 84 P.U.R. (N.S.) 129:

Section 7, N.G.A.—in considering the application and as one of the "issues * * * presented for further consideration and determination:

"(B) Are the service agreements tendered by El Paso for the sale to its customers * * * such as will meet the requirements of the Commission's rules with respect to tariffs, and are the rates and charges to be made * * * consistent with the cost of rendering such service * * *." (p. 177)

1961 In the Matters of United Gas Pipeline Co., et al. 10 F.P.C. 38:

Section 7, N.G.A.—at page 45 appears "Rates and economic feasibility."

"For these two sales United proposes a rate consisting of $1.30 per M.c.f. per month of demand and 13 cents per M.c.f. commodity * * *."

There is extended discussion as to specific rates.

1961 In the Matter of Atlantic Gulf Gas Co., 10 F.P.C. 79, at 83, 29 P.U.R. (N.S.) 272:

Section 7, N.G.A.—a price of 30 cents per M.c.f. was proposed by applicant. Under the heading "Economic feasibility"—

"* * * Applicant has stated that the 30 cents per M.c.f. rate is the lowest applicant can offer * * *"

The Commission stated:

"* * * We do not think that Atlantic Gulf has shown on this record that it is 'able and willing properly to do the acts and to perform the service proposed.'"

1962 In the Matter of Northern Natural Gas Co., 11 F.P.C. 174, 94 P.U.R. (N.S.) 466:

Section 7, N.G.A.—at page 188:

"Northern presented evidence concerning the economic and financial feasibility of its G-1618 project, its plans for financing the project, and the possible impact of such project upon Northern's existing rates subject to the jurisdiction of the Commission."

1953 Algonquin Gas Transmission Company, 12 F.P.C. 209:

Section 7, N.G.A.—at page 219 the Opinion discusses "economic feasibility"; at page 220 is discussed:

"* * * its proposed rate consisting of a demand charge of 4.25¢ per M.c.f. * * * and a commodity charge of 30 cents per M.c.f."

1954 Pacific Northwest Pipeline Corporation, 6 P.U.R. 3d. 403:

Section 7, N.G.A.—at page 416:

"Under the rates proposed to be charged they can secure the estimated volumes and such rates will produce revenues adequate to cover operating expenses and taxes with sufficient return to insure the necessary financing."

1955 Northern Natural Gas Co., 14 F.P.C. 11, 9 P.U.R. 3d 8:

Section 7, N.G.A.—at page 32 is set forth a specific demand and commodity charge.

1955 American Louisiana Pipeline Co., 20 F.P.C. 575, 21 P.U.R. 3d 530:

Section 7, N.G.A.—at page 588 proposed rates were discussed.

1959 Midwestern Gas Transmission Co., 22 F.P.C. 775, 26 P.U.R. 3d 388:

Section 7, N.G.A.—at pages 785 to 791 the Commission discusses rates.

1959 Midwestern Gas Transmission Co., 21 F.P.C. 653, 29 P.U.R. 3d 396:

Section 7, N.G.A.—at page 658:

"It is ordinarily not possible to hold a full rate proceeding before issuing each certificate of public convenience and necessity, but we are authorized to inquire into rates proposed to determine whether they are consistent with the public convenience and necessity."

1959 Transwestern Pipeline Co., 22 F.P.C. 391, 29 P.U.R. 3d 556:

Section 7, N.G.A.—Transwestern's proposed rate schedule was offered, considered, part of it rejected and modified.

1960 Pacific Gas Transmission Co., Docket No. G-17350 et al.:

Section 7, N.G.A.—"The Pacific Gas Transmission Tariff" is a subject heading (page 4 of Commission order).

1960 El Paso Natural Gas Co., Docket No. G-16235, Examiner's proposed decision:

Section 7, N.G.A.—rates proposed, considered, examined and approved. "Rate Schedule G-1" an exhibit in case.